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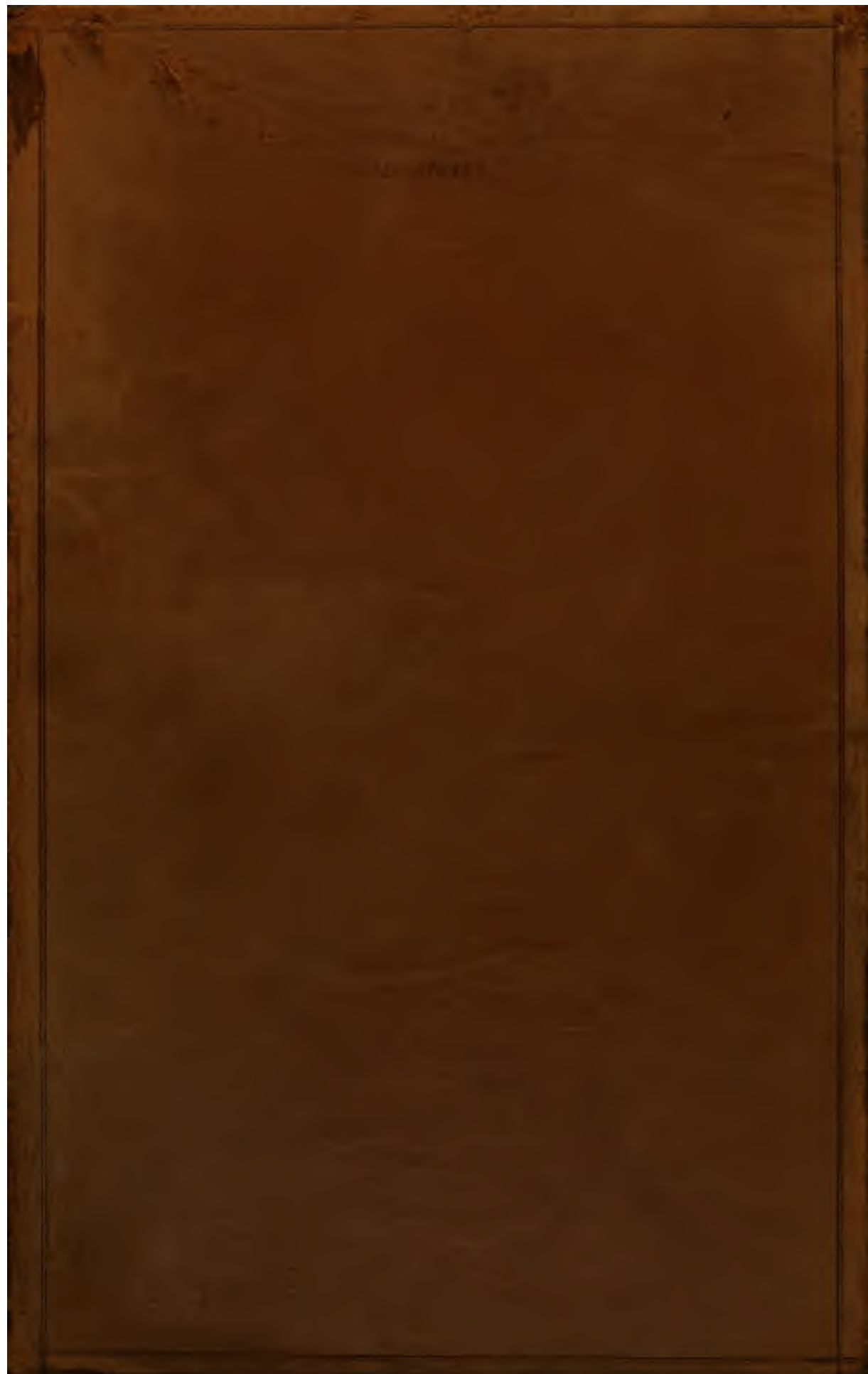
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A TREATISE
ON THE
LAW OF WILLS,
INCLUDING THEIR
EXECUTION, REVOCATION, ETC.;

ALSO A
FULL DISCUSSION OF THE RULES AND PRINCIPLES OF THEIR
CONSTRUCTION, TOGETHER WITH A CONSIDERATION OF
THOSE RULES OF THE LAW OF REAL PROPERTY
AND OF THE DOCTRINES OF EQUITY WHICH
ARE MOST FREQUENTLY APPLICABLE
TO TESTAMENTARY DISPO-
SITIONS OF PROPERTY,

WITH
FULL REFERENCES TO THE LATEST AMERICAN
AND ENGLISH DECISIONS.

BY
H. C. UNDERHILL, LL. B.,
OF THE NEW YORK BAR,
AUTHOR OF A "TREATISE ON THE LAW OF EVIDENCE," AND A
"TREATISE ON THE LAW OF CRIMINAL EVIDENCE."

IN TWO VOLUMES.

VOL. I.

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MADISON, WIS.

TO
MY DAUGHTER
RUTH C. UNDERHILL,
THESE VOLUMES
ARE AFFECTIONATELY DEDICATED
BY THE AUTHOR.

PREFACE.

The subject of the disposition by will of the property of deceased persons has always been a favorite with the writers of legal text books. Numerous attempts have been made from the time of Swinburne to the present, to treat it more or less elaborately, and from various standpoints. In view of this fact it is appropriate, if not indispensable, that the author of a new treatise upon a theme which has been so thoroughly discussed should state the reasons which have influenced him to select this subject; and should announce the rules and principles by which he has been guided in the execution of the volumes now presented to the public. This is the more necessary as it is certain that the plan, the theory and the merits of his work will be placed in comparison with the many excellent treatises on the subject which are now in the hands of the legal profession.

All rules which compose the system of jurisprudence by which wills are now governed and regulated may be divided into two classes. In the first class are comprised rules and maxims of construction and interpretation. In the second are rules of law, properly so called, including under that term those legal principles commonly called presumptions of law, which have for their basis either an existing state of facts, or one which is assumed to exist in the particular case. Under the signification of the term "interpretation" we must include those rules by which the true meaning of the words which, in the particular case under consideration, the testator has seen fit to use, is ascertained; and by virtue of which, as well, this

meaning is so explained to others that they receive from the words the identical ideas which were present in the mind of the testator when he used them. By construction, as used in connection with wills, we mean that mental process by which is ascertained, not the meaning of isolated and independent words, but the general plan of the testamentary disposition which is contained in the whole will, or in any separate and independent portion of it. Interpretation and construction have therefore to do solely with the ascertainment of the intention of the testator. Other questions which are of very great importance, but which can only be answered by the application of legal rules, may require to be discussed either before or after the intention is ascertained. For example, it is always necessary to determine, before construing a writing as a will, whether in fact *it is a will*; that is to say, whether the writer meant it to operate as a will, and if so whether it was properly executed by a person possessing testamentary capacity. In other words, the admission of the writing to probate is an indispensable preliminary to the ascertainment of the intention which it purports to express. Assuming that the writing is a will and that the meaning of its language has been ascertained by interpretation and construction, it remains to determine whether the disposition of the property which has been made by the testator is valid according to settled rules of law. These problems involve no inquiry into the intention of the testator, and cannot be solved by applying rules of construction. Their solution depends upon the rules of the substantive law, statutory or otherwise. Now it is obvious from this analysis that the determination of the nature and validity of the writing and of the validity of any particular provision in it depend upon principles which are altogether outside of the realm of construction. And it is equally clear that it is as important to decide whether a will was executed properly in

accordance with statutory requirements and voluntarily and without coercion by a person having testamentary capacity as to determine the meaning of any phrase or word which is contained in it. These facts should be borne in mind in an endeavor to formulate in writing any system of rules governing testamentary succession.

In discussing the system of law above outlined, the author has in general adhered closely to the rules and principles of law which have been enunciated by the courts of last resort, preferring rather to record the law as he has found it to exist at the present day than to state what in his own opinion the law ought to be. Where the courts have differed in determining the law, he has not, as a general rule, sought to reconcile the decisions, except to point out, when necessary, the different circumstances under which the variant decisions were rendered. While the most recent American citations, as being most accessible, have been given the preference, the early American decisions and the English decisions, particularly those which are recognized as leading cases, have neither been overlooked nor intentionally omitted.

Appreciating the fact that the main difficulty which arises in the construction of wills is to determine to what extent general principles are applicable to the particular words of the will, or, when a question of capacity or revocation arises, what rule of law is applicable to the particular facts of the case, the attempt has been made to make the citation of cases comparatively exhaustive. Many thousand cases have been examined, analyzed and cited. It will be found in the majority of cases that not only is the page in the report cited upon which the case cited begins, but that the page which contains or affirms the rule of law which the case is given to support is also cited. Where cases have been cited from the reports of the National Reporter system, the official reports have also been cited so far

as the cases have been officially reported prior to the date of going to press.

In conclusion it may be stated that the various subjects which, taken together, constitute the law of wills, and which may be properly treated as such, have been so arranged in these volumes that those subjects which are exclusively a part of the law of wills, as, for example, testamentary capacity, undue influence, execution, revocation, and the like, are contained in volume 1; while those subjects which, though very frequently invoked in relation to wills, may also be included under some other head of the law, as, for example, equitable election and satisfaction, are comprised in the second volume. As a result of this, the first volume alone may be used with advantage and profit, by the student in the law school or elsewhere, as a complete treatise on the law of testamentary succession; while the second, covering subjects usually discussed from other standpoints in the elementary books of equity and real property law, is of value to the practitioner.

H. C. UNDERHILL.

1098 Lafayette Avenue,
BOROUGH OF BROOKLYN,
CITY OF NEW YORK,
January, 1900.

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THE LAW OF WILLS.

THE LAW OF WILLS.

CHAPTER I

THE TESTAMENTARY POWER — THE FORM AND CLASSIFICATION OF WILLS.

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| <p>§ 1. The origin of the testamentary power.</p> <p>2. The power of disposing of property by will among the Anglo-Saxons.</p> <p>3. Modification of the power to devise land succeeding the Norman Conquest.</p> <p>4. Definition of a will.</p> <p>5. An instrument may be a will without disposing of property.</p> <p>6. The necessity for the appointment of an executor.</p> <p>7. Definition of the word "codicil."</p> <p>8. Wills to take effect on the happening of a contingency.</p> <p>9. The statutory requirements of holographic wills.</p> <p>10. Incorporation of non-holographic papers by reference.</p> <p>11. Joint wills and mutual wills defined and distinguished.</p> <p>12. The probate of joint and mutual wills.</p> | <p>§ 13. The revocation of joint and mutual wills.</p> <p>14. From what time a will speaks.</p> <p>15. Words referring to the present time.</p> <p>16. The legislative control of the testamentary power.</p> <p>17. The retrospective action of statutes which regulate the formalities of execution where a statute is passed prior to the death of the testator.</p> <p>18. Statutes providing that the marriage of the testator shall revoke are not retroactive.</p> <p>19. Disposition of property according to law means law existing at the testator's death.</p> <p>20. Effect of statutory enactment subsequent to the death of the testator.</p> <p>21. Statutory regulations as to property acquired after the execution of the will.</p> <p>21a. The determination of survivorship in case of death by same disaster.</p> |
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§ 1. The origin of the testamentary power.— Among savage and semi-savage races each man owns that only which his hands can grasp and hold. The weapon with which he attacks his enemy and the shield with which he defends himself, the canoe in which he traverses the flood, threads the streams and navigates the rivers, and the paddle by which the frail boat is propelled, are his only so long as he is able to retain actual possession of them. His possession is at all times subject to

be divested by the superior strength or cunning of his enemies, or of some of the more powerful and rapacious or necessitous members of his own tribe. When at last the actual grasp of the savage owner upon the things which have belonged to him in life is loosened by the touch of death, and they drop from his relaxing fingers, their ownership devolves according to no regular rule, but belongs to him who is the first to seize and the strongest to retain. Now it most commonly happens in savage as in civilized society that a man's death-bed is surrounded by his nearest of kin, or at least by his wife and children. What more natural, then, that the ownership of the few movable articles which the dying man possessed should as a matter of custom go to those who, being the nearest to him, were in the best position to acquire the actual possession of that which he was compelled to leave? Such, accordingly, is the germ of the law of intestate succession as we find it in primitive society.

As civilization advanced, there occurred a great increase in the quantity and value of movable property. Succeeding the rude and uncultivated savage, wandering about from camping ground to camping ground, and gaining a bare subsistence by hunting and fishing, we find the shepherd or the herdsman. He also was nomadic in his habits, though his wanderings were more limited than his savage forefather, being circumscribed by the necessity for obtaining pasturage and water for the flocks of sheep and herds of cattle, camels, horses and other animals of which he was the owner. With the ownership of domestic animals and of slaves captured in war, the idea of a possession which was *not actual, but constructive*, became more familiar and acceptable. The ownership of such large collections of movable property could no longer be acquired by actual tradition, and for that reason it was transferred by ceremonies and acts wholly symbolic in their character, as by the delivery of a handful of wool to pass the title to a flock of sheep. In this stage of society the right of the children to take, as the nearest of kin of the parent, the movable property which in life belonged to him, was first fully recognized. But land as yet had not been held in individual ownership, except, perhaps, for a burial place, as in the case of the purchase by Abraham of the cave of Machpelah.

With the increase in the ownership of movable property the custom soon grew up to permit the owner of extensive flocks and herds to make a gift of the same upon his death-bed to some favorite slave, or to a friend whose presence had soothed his dying hours. Such a death-bed gift, to take effect upon the death of the testator, not accompanied by an *actual delivery* of the thing given, is undoubtedly the germ of the modern will, though it did not possess one of the most important characteristics of the latter instrument, *i. e.*, its revocability. A gift of this character, comprising usually only some specific chattel, made to an individual, differs widely from the idea of the Roman testament. In the one, the purpose of the act was to confer the ownership of property upon some individual, either friend or kinsman. In the other, the purpose was to perpetuate the power and succession of the family by the nomination of a person who was to represent the testator after his death as the head of the *gens* or family, and on whom would devolve not only his property, but his power and authority as well.¹

§ 2. The power of disposing of property by will among the Anglo-Saxons.—During the three or four centuries which immediately followed the conquest of Britain by those northern freebooters, loosely denominated Anglo-Saxons, the conditions of society were such that but little necessity existed for rules regulating the disposition of property after death. The island was rent by constant warfare, waged between the invaders and its inhabitants. Subsequently, when the latter had been conquered, strife and bloodshed were for centuries rampant among the victorious invaders; though when, in the course of four or five centuries of struggle, the conquerors had become more civilized, and had settled down into a permanent and peaceful occupation of the land and property of their predecessors, we find numerous examples of Thegns disposing both of chattels and lands.

In the meantime Christianity, which had been almost wholly extirpated by the heathen invaders, had been re-introduced by

¹ "The making of a will among the Romans," says Maine, "was at first not a mode of distributing a dead man's goods, but one among several ways of transferring the representation of the household to a new chief. The goods descended, no doubt, to the heir, but that is only because the government of the family carries with it in its devolution the power of disposing of the common stock." *Ancient Law*, ch. VI, p. 194.

missionaries from the Continent. Numerous and powerful monasteries, which were at once the centers of religion and of culture, had been established throughout the land, and priests resided at the king's court and in the households of the Thengs. The clergy already exercised a powerful influence. The practice of confession and the administration of the last rites of the church at death resulted in the presence of a cleric at the death-bed, if not in every case, at least in the case of those of high social and political condition, among whom the principles of the new religion found the readiest acceptance. The tendency naturally was for the representatives of religion to endeavor to secure some portion of the dying man's property for the benefit of the church. On the other hand, the latter was prompted by the influence attending confession, and by a desire to manifest his repentance, to devise some portion of his property to religious purposes, in order to propitiate that Deity whom he had in life offended.

But as yet there were no written wills. The dying man could say in the presence of those about his bed, "I give my horse," or "I give my books, or my silver cup," and in the case of lands, "I give my land after my death," and the gift thus made constituted a will only so far as it took effect from his death. It may well be imagined that the kindred of the donor looked with jealous eyes upon the influence exerted by the priests; so that the question soon suggested itself, Can a priest or a deacon be a witness to the last words by which the dying man disposes of his property? The answer to this was that while *one* such witness might be sufficient, it was better, in view of the avarice of the dying man's relations, as they termed it, that two or more witnesses should be produced. It would naturally suggest itself to the priest who was at the bedside of the dying man, that the *post-mortem* disposition could be more readily proved if reduced to writing; and he, being probably the only person present able to write, would be the scrivener. We do not know how much of his estate a man could thus dispose of; probably custom gave the lord and the kindred of the deceased a fixed share which he could not give away.¹

In the ninth and tenth centuries, written wills, principally

¹2 Black. Com., p. 489.

of great men, are numerous; and from all the evidence we have, it appears that the right to make a will was a peculiar privilege enjoyed only by the rich and powerful, such as the kings and bishops, the knights and eoldermann. But this proves, not that the common people did not possess the power to dispose of their property on their death-beds, but rather that history, concerning itself solely with the affairs of the great, has neglected to record similar transactions of humbler folk. That the right was not an absolute right, at least until a later period, we may safely assume. Its exercise may have depended upon the consent of some superior; indeed we often find that the will begins with a prayer that the king or bishop will aid in carrying out its provisions, and will protect those to whom the property has been given. Such, in short, was the condition of the law of *post-mortem* disposition among the Anglo-Saxons for the three centuries which preceded the Norman conquest.

§ 3. Modification of power to devise land succeeding the Norman conquest.—Whether or not the Feudal System was introduced by the Normans into England, or whether it existed there prior to their arrival, is a question which has been most thoroughly discussed with little unanimity of opinion. Assuming that it existed among the Anglo-Saxons, it was in a most rudimentary form, and undoubtedly its full development in after times was due almost wholly to the fostering care of the Norman invaders, and to the shrewdness and diligence of the foreigners. The introduction of the Feudal System had, however, very little to do with the destruction of the right to devise freehold lands, which undoubtedly existed among the Saxons.¹ Feudalism had its influence, among other things; but we are safe in asserting that to it alone cannot be attributed the destruction of this privilege. Other influences were at work, proceeding not from the feudal lords, but from the justices of the king's court. Glanville, in the thirteenth century, states that every one may in his life-time give away his lands to whom he pleases, provided a reasonable share of them is retained to enable him to perform his feudal services. But he, while saying this, denies that privilege to one who is at

¹2 Black. Com., pp. 374-377.

death's door,¹ not, as might be supposed, for the benefit of his lord, but to protect the interest of the heir; and the argument which Glanville uses, as to the possession of the right of testamentary disposition over lands, is the incapacity of such a man, with his mind, reason and memory impaired, to devise them properly.

The aim of the law was to protect the interest of the heir against the undue influence of those who surrounded the bedside of the dying man. The tenant who held freehold land could devise it with the lord's consent, and his act would be valid, though not as a devise, if the heir after the death of his ancestor should either release his right of entry or give livery of seizin to the person who claimed by the operation of the otherwise invalid devise. The rules of the law of the king's justices applied only to those within their jurisdiction. In the cities, where lands were held by burgage tenure, and where the tenants were in the exclusive jurisdiction of the borough courts, the right to devise land still survived. The burgher of Oxford or London, down to the end of the thirteenth century, might still dispose of his lands to whomsoever he pleased, and his will would be sustained by the borough courts.

Another thing which tended to destroy the right to devise was the necessity for livery of seizin to the transfer of title to the lands. The performance of some symbolical act by which the transfer of the title and possession of land or other property may be manifested was not peculiar to the feudal system. We find it existing among the Hebrews in Scripture times, and it was well recognized among the Romans at the earliest period. Indeed it is from the maxim of the Roman law, "*Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur*,"² that the doctrine of transferring the title and possession of land by its constructive delivery as evidenced by livery of seizin is derived. There could be no livery in the case of a *post obit* disposition of land. The donor was in no physical condition to comply with this requirement; and the donee, when the time came for him to enter into possession, was confronted by the heir, from whom alone he could accept livery of seizin, with a refusal. The consequence of this was that the right to devise

¹ L. T., ch. 1.

² Cod. 2, 3, 20.

freehold lands ceased to exist wherever actual livery was necessary to their possession.

Another circumstance which tended to bring about the abrogation of the right to devise was the principle of primogeniture. The person who took all the land as heir was usually a very different person from him who took the chattels of the testator. The courts of the king protected *his* interests because of their great importance from a military and political standpoint, and permitted those who claimed the personal chattels to resort to the church courts. The consequence of this was that while the determination of the descent of real property was exclusively for the king's court, wills disposing of personal property were gradually taken into the exclusive jurisdiction of the ecclesiastical courts. In so far as these latter courts obtained power and influence by extending their free operation, it became the object of the priests to discourage intestacy as far as personal property was concerned, and to procure the making of wills by which they benefited. Thus, while wills of chattels continuously became more numerous, wills of land gradually ceased to be made; and finally the power to devise lands altogether ceased to exist, until it was revived in the year 1541 by the statute of 32 Henry VIII. But the preponderance both in value and importance of real property over personal property which then existed rendered the right to bequeath personal chattels of very little moment, because of the fact that they constituted but a very small part of the wealth of the kingdom. It was natural that an effort should be made to facilitate the devise of land. It was not long after the introduction of uses that land-owners discovered that by the kindly aid of the clerics who controlled the court of chancery they could dispose of their real property by will. Freehold lands could be enfeoffed by livery of seizin to a person to hold the legal title to use of the last will of the feoffor, and the latter might then devise the use, which devise would be sustained in equity as an appointment by will, and the feoffee would be regarded in equity as a trustee for the person designated by the last will of the feoffor.¹

§ 4. Definition of a will.—“A will,” says Mr. Jarman,² “is an instrument by which a person makes a disposition of his

¹ See *post*, § 771.

² Jarman on Wills, p. 16.

property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life." The definition is concise, and, in the great majority of instances, is correct. But it is now well settled that an instrument may be a valid will without disposing of any property.¹ A person may be willing to permit his property, whether real or personal, to be distributed as though he died intestate; but he may have a suspicion of the integrity of the person whom the law would make administrator, and may wish to have the distribution attended to by some one in whom he has confidence. He may therefore appoint such a person his executor by an instrument, which, if properly executed, will be a valid will, and should be probated as such though disposing of no property.²

When the will operates upon personal property it is sometimes called a *testament*, and when upon real estate, a *devise*; but the more general and the more popular denomination of the instrument, embracing equally real and personal estate, is that of *last will and testament*.³

¹ § 5, *post*.

² See *post*, § 5. "The legal declaration of a man's intention which he wills to be performed after his death." 2 Bl. Com. 499; *Smith v. Bell*, 6 Peters (U. S.), 75. Chancellor Kent, in 4 Com., p. 490, defines a will as "a disposition of real and personal property to take effect after the death of the maker."

³ The definition of a will or testament given by Modestinus, in the Roman law, has been justly admired for its precision: *Testamentum est voluntatis nostræ juxta sententia de eo quod quis post mortem suam fieri velit*. Dig. 28, 1, 1. In *Hubbard v. Hubbard*, 12 Barb. (N. Y., 1851), 153, a will is defined as "a declaration of the mind, either by word or writing, in disposing of an estate to take place after the death of the testator." An instrument in any form, if its obvious purpose is not to take place till after the death of the

maker, operates as a will. The essence of the definition is, Is it a disposition to take effect after death? The form is not material. *Frew v. Clark*, 80 Pa. St. (1875), 178; *post*, §§ 37-45. "A testament is the full and complete declaration of a man's mind, or last will of that he would have done to be done after his death; . . . and this is sometimes called a will, or a last will." Shep. Touch. 899. "A testament, taken strictly according to the definition thereof, differeth from a last will, yet not as opposite thereto, but only as the species differeth from the genus; for every testament is a last will, but every last will is not a testament. A last will is a general word, and agrees with each several kinds of last wills or testaments; but a testament, properly so called, is only that kind of last will wherein an executor is named." Godolphin, Orph. Leg. 5.

The words "last will" are now regarded as precisely synonymous with the word "testament." The latter word had its origin in the Roman law, and was distinguished in the early ecclesiastical courts from the last will, being applied exclusively to those wills in which an executor was appointed.

As we shall see,¹ in early times the appointment of an executor was indispensable. But this distinction is now obsolete, and the term "last will and testament" may be used to indicate any testamentary instrument, whatever its form, and irrespective of the fact that it does not nominate an executor. After the passage of the statute of wills it became the custom to apply the word "will" exclusively to instruments devising real estate which were within the jurisdiction of common-law courts. Such a disposition was called a devise, which word has been derived from the Latin word *devidere*, to divide. Instruments disposing of personal property were not within the common-law jurisdiction, and they were more frequently called testaments; while gifts of personal property were termed legacies, which term, of course, was derived from the Roman law. But the distinction, so far as jurisdiction is concerned, does not exist in any of the states of the Union, though it is still recognized in England.

§ 5. An instrument may be a will without disposing of property.—An instrument executed in the form of a will, appointing an executor, though it neither disposes of personal property nor directs the executor to perform any of his ordinary functions, is a valid will, and should be admitted to probate unless the person appointed is dead or renounces.² An instrument only appointing executors, and authorizing them to sell the real estate of the testator;³ a paper revoking former wills, appointing an executor, and stating that the testator intended to die intestate, "that his property may devolve on his heirs and next of kin;"⁴ or an instrument which the testator added

¹ § 6.

² Wms. on Ex'rs, p. 268; 3 Redfield on Wills, p. 56, § 15; In re John's Will (Oreg., 1897), 47 Pac. R. 341; Dayton on Sur., p. 205; In re Lancaster, 1 Sw. & T. 464; In re Jordan, L. R. 1 P. & D. 555; Brownrigg v. Pike,

L. R. 7 P. D. 61, 63. Cf. Pepper's Est., 148 Pa. St. 5, 23 Atl. R. 1039.

³ Barber v. Barber, 17 Hun (N. Y.), 72, 73.

⁴ Brenchley v. Still, 2 Rob. 162, and cases cited *post*, § 200.

to a former will (which could not be found), stating in it that he revoked all former codicils,¹ has been held a valid will and admitted to probate.²

In England an instrument appointing an executor will be admitted to probate, where it disposes only of real property over which the executor has no control,³ though a will relating exclusively to real property will not be probated in England, if it appoints no executor;⁴ and such wills have been refused probate, even where an executor has been appointed.⁵ The will of a married woman executing a power of appointment over real property is not entitled to probate in England.⁶

§ 6. **The necessity for the appointment of an executor.**—The office of executor is very ancient. He has been known under many names. In the beginning a dying man made a gift to some friend, perhaps for the benefit of the church,⁷ and this gift, though not in any sense a will, was protected by the ecclesiastical courts, who treated the donee as the trustee of a pious trust. As the distinction between real property and personal property became better established, the office of the executor became more important. He protected the interests of the legatees against the heir, and, as he was usually some clerical person, he naturally sought the protection of the ecclesiastical law. The custom of making wills of personal property, oral or written, became well nigh universal and was fostered by the church authorities. The naming of the executor was regarded as an indispensable requisite of a will of personal

¹ In the Goods of Hubbard, L. R. 1 P. & D. 53, 54.

² A writing, though in form a will, and in which the writer states in the preamble is *his last will*, which disposes of *no property and appoints no executor*, but merely directs that one of his children shall be excluded from all share in his estate, is not a will and does not give devises by implication to the other children. The child mentioned is not disinherited, for the right to disinherit an heir exists only as the result of the testamentary power; and, when the will is invalid, the writer of it is intes-

tate. Coffman v. Coffman, 85 Va. 459, 463.

³ Brownrigg v. Pike, 7 P. D. 61, 63; Beard v. Beard, 3 Atk. 72, 73; In the Goods of Jordan, L. R. 1 P. & D. 555.

⁴ In re Bootle, L. R. 3 P. & D. 177.

⁵ In Goods of Bootle, L. R. 3 P. & D. 177, 179; In the Goods of Drummond, 2 Sw. & T. (1860), 8, 11; O'Dwyer v. Geare, 1 Sw. & T. 465, 466.

⁶ In re Cubbon, L. R. 11 P. D. 169; In re Tomlinson, 6 P. D. 209, 210; In re Barden, L. R. 1 P. & D. 325; In re Hornbuckle, L. R. 15 P. D. 149, 151. See *post*, §§ 121, 122.

⁷ § 3, *ante*.

property, and a will which did not appoint an executor would not be probated in the church courts.¹ But this rule has long been abolished, and the statutes usually provide for the appointment of an administrator with the will annexed, who has the same power as regards the personal property as the executor.²

§ 7. Definition of the word "codicil."—A codicil, from *codicillus*, a small *codex*, a little book or writing, may be defined as a writing by the testator intended as a supplement or addition to his will, the effect of which may be either to enlarge or restrict it, or to annul or revoke it altogether. It may add to or subtract from provisions of the will, may explain or alter, confirm or revoke them wholly or in part; or, when the will itself is invalid, may by a valid re-execution and republication revive and renew the will. The execution of a valid codicil is a republication of the will in the condition that it then is, so as to include matter which was attached to the will since its execution.³ The will and all intermediate writings and codicils subsequently written are regarded as one instrument, whether attached to one another by some material substance or not.

All the papers, including all codicils, are to be construed together unless it shall appear⁴ that the testator, in using the

¹Swinnburne, pt. 1, ch. 1, pl. 19; Woodward v. Lord Darcy, Plow. 185, 281; 2 Black. Com., p. 500.

²Wyrall v. Hall, L. R. 2 Ch. 112; Brady v. McCrosson (1881), 5 Redf. 431, 433; Smith v. Smith, 168 Ill. 488, 500. The testator may himself appoint a successor to the executor, who on his death or renunciation is to take his place. Kinny v. Kepling, 172 Ill. 449, 457, 50 N. E. R. 131; Hartnett v. Woodhull, 60 N. Y. 346. See also post, § 784. A nomination or appointment of an executor need not be in express terms, as, "I nominate and appoint A. the executor of this will." If on the whole will it is apparent that the testator intends that a particular person named in the will

is to be intrusted with carrying out its provisions as an executor, it is not material that he merely states he wishes him to have charge of the estate. See Pickering v. Towers, Ambl. 364; 2 Black. Com. 503. All persons are capable of being executors who are capable of making wills. Others who are not may yet be appointed, as corporations, *femmes couvertes*, infants and children *en ventre sa mere*, or even persons not conceived at the death of the testator. At the common law an infant must be at least of the age of seventeen years before he could qualify as executor. 2 Black. Com. 503.

³ §§ 217-220.

⁴ §§ 279-284.

word "will," did not intend to refer to the codicil;¹ and all are to be admitted to probate together.²

§ 8. Wills to take effect on the happening of a contingency.—A will which is to be effective and valid as the last will of the testator only upon the happening of a contingent event is a contingent will; and, if the event does not happen, the will is *ipso facto* annulled and revoked. These contingent wills are usually executed by the testator before starting upon a journey or embarking upon a voyage, or in contemplation of some imminent risk or peril, and are intended to be operative only in case he shall die before his return. In case he returns home the will is revoked and probate cannot be had.³

In determining whether probate shall be refused upon the ground that the contingency upon which the validity of the will depends has not taken place, two issues are presented to the court. *First.* Was it the intention of the testator that the validity of the will should depend upon the happening of the event, as, for example, upon his death during a journey, or did

¹ *Ela v. Edwards*, 16 Gray (82 Mass.), 91; *Negley v. Gard*, 20 Ohio, 310; *Sloane v. Stevens*, 107 N. Y. (1888), 122, 127; *Pierpont v. Patrick*, 53 N. Y. 591; *Wetmore v. Parker*, 52 N. Y. 450, 460; *Fuller v. Hooper*, 2 Ves. Sr. 333.

² In the case of *Lamb v. Lamb*, 11 Pick. (Mass.) 375 (1831), the word is defined by Shaw, C. J., as "A clause added to a will after its execution, the purpose of which usually is to alter, enlarge or restrain the provisions of the will, or to explain, confirm or republish it." "A codicil is an addition or supplement to a will. . . . It is no revocation of a will except in the precise degree in which it is inconsistent with it, unless there be words of revocation." 4 Kent, Com. 531. See also *post*, § 247. "A codicil, also, is in writing or by word, as a testament is." *Shep. Touch.* 399. "In construing a codicil in reference to the will, the leading and controlling object is . . . to ascertain the intention of the tes-

tator. So far as a purpose to vary the will, either by adding to or subtracting from it, can be discovered, that purpose, if a lawful one, is to be carried out; but the intention of the testator as declared in his will is not to be varied further than is necessary to carry out such purpose." *Remarks of Battle, J., in Bradley v. Gibbs*, 2 Jones, Eq. (55 N. C., 1854), 13, 15.

³ *In re Goods of Graham*, 41 L. J. Prob. 46; L. R. 2 P. & D. 385; *In re Dobson*, L. R. 1 P. & D. 88; *Id.* 380; *In re Newton*, 42 L. J. Prob. 58; *In re Smith*, L. R. 1 P. & D. 717; *Roberts v. Roberts*, 1 Sw. & Tr. 337; 31 L. J. Prob. 46; *In re Hugo*, 2 P. D. 73. In the *Goods of Porter*, L. R. 2 P. & D. 22, a contingent will is thus defined: "A contingent or conditional will is one that is to take effect upon the happening or not of some event; or upon a certain set of circumstances being or not being in existence in such and such a time named, or during a certain period."

he, in describing the contemplated journey or voyage, merely intend to particularize the circumstances and inducements which surrounded him and which prompted its execution? *Second*. If it appears that the will was to be valid only in case of the happening of the contingency, the question arises, Does the condition attach to the whole will or only to some portion of it?¹

¹ *Damon v. Damon*, 8 Allen (90 Mass., 1864), 192, 194; *Urey's Adm'r v. Urey's Ex'r*, 86 Ky. 354, 5 S. W. R. 859. The following expressions have been held to describe the cause, reason or occasion of making the will, and the wills in which they occurred were admitted to probate, though the testator had survived the peril in which he was placed: "In case of accident I sign this will." *Bateman v. Pennington*, 8 Moore P. C. C. 223. "In the event of my death while serving in this horrid climate, or in case of any accident happening to me." *Thorne's Case*, 4 Sw. & T. 88. "In case of any fatal accident happening to me, I being about to travel by railway." *Dobson's Case*, L. R. 1 P. & D. 88. "And in the event of my death occurring." *Martin's Case*, L. R. 1 P. & D. 380. "If I die at sea or abroad." *Lindsay v. Lindsay*, L. R. 2 P. & D. 459; 42 L. J. Prob. 32. "I, J. W. D., . . . being about to go to Cuba, and knowing the dangers of voyages, do make this as my last will . . . First, if by casualty or otherwise I should lose my life during this voyage, I give," etc. *Damon v. Damon*, 8 Allen (Mass.), 192, 194. "In anticipation of my departure from Baltimore, and to provide for possible contingencies." *Kelleher v. Kernan*, 60 Md. 440 (1883). "Being . . . in feeble health and about to start upon a long journey, and subject to the common casualties of others." *Bradford's Adm'r v. Bradford*, 81 Ky. —. "If any accident should happen me that I die from home." *Dikefield v. Dikefield*, 82 Ky.

589 (1885). Where the will began as follows: "According to my present intention, should anything happen to me before I reach my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars now in the hands of E.," it was held that the language was expressive of the occasion of making the will, and that, though the testatrix reached her friends, and died subsequently, the will might properly be admitted to probate. *Ex parte Lindsay*, 2 Bradf. (N. Y.) 204. A letter written by the deceased on the eve of starting on a sea voyage was as follows: "We go on board to-morrow. . . . If anything happens to us on the way, my will has been accidentally packed away in a tin box to which I cannot get access." The letter then appointed an executor and made numerous and large testamentary dispositions, repeating and supplementing the provisions of the will. The letter was held *not* a conditional will, and, though the testator survived the voyage several years, both papers were admitted to probate as his will. *Halford v. Halford*, Prob. (1896), 36, 39. So a letter which read: "If we remain here making paths . . . the chances are in favor of us being killed, and as I may not have an opportunity of saying what I wish to be done with any little money I may possess, in case of accident, I wish to make every thing I possess over to you." In the Goods of *Spratt*, L. R. 1 P. D. (1896), 28. Or, "On leaving for . . . in case of my death on the way . . . this is a memorandum

The fact that the testator, after his safe return from his journey, carefully preserved the will, or the fact that he neglected to destroy it, is material but not conclusive to show how he regards the instrument. If from the language of the will itself it clearly and satisfactorily appears that it was only to be valid in case of a fatal termination of the journey, it cannot be probated as a will if he survive, unless the testator shall re-execute it as a will after his escape from peril.¹ The intention of the testator as to the character of a writing claimed to be a contingent will must be gathered from the instrument. The matter is wholly one of construction. No form of words necessarily renders the will conditional. The expressions usually employed are: "Should anything happen to me;" "should I fail to return;" "if I do not survive;" "in case of accident;" "to provide against accident," and the like. Whatever may be the language, the leaning of the court is *against the admission of such wills to probate*. Where the testator has survived the imminent peril and subsequently died, the party propounding the will is required to show facts from which an intention that the instrument should operate as a will may be satisfactorily inferred.²

of my last will and testament," is not a conditional will. In *re Goods of Mayd*, L. R. 6 P. D. 17.

¹ See cases cited in next note.

² In the following cases, where the party who executed the alleged testamentary writing returned home, probate was refused: *Marrows' Appeal*, 116 Pa. St. 440, 9 Atl. R. 660 (1887); *Maxwell v. Maxwell*, 3 Metc. (60 Ky.) 101, 103-113. In this case the person, while traveling and in imminent peril, made a will in which he said: "If I never get back I leave everything in the world to you." *Dougherty v. Dougherty*, 4 Metc. (61 Ky.) 25, 26, 27. In *re Porter*, 2 P. & D. 22, where the deceased wrote a letter in which he said: "Should anything happen to me while I am abroad, I want everything I may then be in possession of to be equally divided as follows," and proceeded to divide

his property. The testamentary division was held conditional; and to the same effect are the cases of *Roberts v. Roberts*, 1 Sw. & Tristram, 337; In *re Goods of Robinson*, L. R. 2 P. & D. 171. In these cases the testator, executing a will prior to starting upon a journey, used the expression, "should anything happen that I should not return alive." See also *Magee v. McNeil*, 41 Miss. 17; *Wagner v. McDonald*, 2 Har. & J. (Md.) 346. In these two cases the testator made testamentary dispositions which were to go into effect "in case he does not get back or return" from a journey he had in contemplation. So where the testator makes a will which is to operate "if he dies before his return from a journey to Ireland." *Parsons v. Lance* (1732), 1 Ves. 190; *Todd's Will*, 2 W. & S. (Pa.) 145; "or in case he does not survive

A will which made only a single bequest, subject to the condition that the legatee should produce from the officers of the ship in which the testator should serve on his next cruise, satisfactory evidence of his decease "during the same," is not a contingent will and ought to be admitted to probate, though the testator did not die on the voyage.¹

§ 9. The statutory requirements of holographic wills.—A holographic will is one entirely written, dated and signed by the hand of the deceased.² In some states a holographic will is by statute valid without attestation and subscription by witnesses.³ The fact that the testator, in writing a holographic will, has intentionally or inadvertently attached an attestation clause to it,⁴ or the fact that the holograph is attested by wit-

to join his wife," *Sinclair v. Howe*, 6 Ves. Jr. 607, the instrument will be void if he survive.

¹ *Thompson v. Connor*, 8 Bradf. (N. Y.) 366. On page 368 the court says: "The testator does not make the will itself dependent upon his not surviving during his proposed voyage; he does not say it shall take effect only upon the contingency that he shall die on that voyage, but he gives generally,—that is, he gives, in presumption of law, upon his decease at any time. Doubtless the possibility of death during the contemplated cruise was considered, and led to the incorporation of the condition in the will; but then the condition refers primarily to evidence; or, in other words, he does not give only upon condition he should die during that voyage, but that certain specified proof of his death should be produced. . . . To make a testament strictly depend upon a condition so as to affect the question of probate, the intention ought to appear very clearly that the will should not take effect except upon the prescribed contingency. The mere *factum* of the instrument implies generally an intention not to die intestate,—a determination to give and

bequeath,—and if the condition is not annexed to the substance of the gift, but only to some collateral matter, such as payment on proof of death, then the gift will be absolute and not conditional, and the condition will be left to operate on the occurrence of the contingency contemplated as to gifts on condition." See *post*, §§ 479-524.

² California Civil Code, § 1277; *In re Rand*, 61 Cal. 468; Mont. Stat., § 439 of Prob. Prac. Act.

³ *In re Schier's Estate*, 78 Cal. 477, 480, 21 Pac. R. 8; *Barney v. Hays*, 11 Mont. 571, 575, 29 Pac. R. 282; *Perkins v. Jones*, 84 Va. 358, 4 S. E. R. 833; *Morris v. Morten* (Ky.), 20 S. W. R. 287; *McIntire v. McIntire*, 19 D. C. 482. But in Wyoming, the courts, construing R. S., § 2237, which requires all wills to be in writing and attested, have held that a holographic will must be attested, though Laws 1890-91, ch. 70, subch. 2, § 13, provide that a holographic will may be proved in the same manner as other private writings are proved. *Neer v. Cowhick* (Wyo.), 81 Pac. R. 962.

⁴ *Perkins v. Jones*, 84 Va. 358, 363, 365, 4 S. E. R. 833; *Hill v. Bell*, Phill. (61 N. C., 1867) Law, 123, 124.

nesses, though not sufficiently so to secure its probate as a properly attested will,¹ does not, *per se*, render the instrument void as a holograph under the statute, if the dispositive part and the date of the will are in the handwriting of the testator and the will is subscribed by him. The court will assume that the testator secured attesting witnesses solely for the purpose of proving his handwriting and not to prove an execution of the will in the statutory mode.

The whole of the will, *including the date*, must have been written by the testator himself. The use of a printed form, the blanks being filled by the hand of the testator, destroys the character of the writing as a valid holographic will.²

The requirement that the will shall have been written by the testator does not require that the handwriting shall be that ordinarily employed by him. If, therefore, to gratify a whim or caprice, he shall disguise his hand, the will is still his holograph, provided it can be shown to have been written by him.³ The statutes also require that the will shall be dated by the testator himself. It is not material in what part of the will the date appears.⁴

Some statutes require that the holographic will shall be *found among the papers of the testator* at his death. This requirement is complied with where the will is found in a trunk which con-

¹ In re Sohler, 78 Cal. 477, 480; Harrison v. Burgess, 1 Hawks (8 N. C., 1820) Law, 384; Brown v. Beaver, 3 Jones (10 N. C., 1824) Law, 516.

² Williams v. Hardy (1860), 15 La. Ann. 286; Rand's Estate, 61 Cal. 468, 475; Gaines v. Lizardi (1877), 3 Woods, C. C. 77; Robertson's Succession (La. Ann., 1896), 21 S. R. 596.

³ Hannah v. Peake, 2 T. B. Mon. (18 Ky., 1825), 133. It would seem logically from this case, that, as it is sufficient if the will is written by the *hand* of the testator, though it is not in his usual handwriting, a holographic will written by the testator upon a typewriter would be valid. But did not the legislature mean that the will in any case should be written with the customary implements in use at the time?

⁴ Zerega v. Percival (1894), 46 La. Ann. 590, 603, 15 S. R. 476. The statute of Louisiana requires the will to be "entirely written, dated and signed by the hand of the testator." Rev. Civ. Code, art. 1588; Heffner v. Heffner, 48 La. Ann. 1088, 20 S. R. 281. This provision was copied from the Code Napoleon, which was in turn taken from an ordinance of Louis XV. The law of France has uniformly held that the signature to a will must be at the end, or, at least, that no dispositive part shall follow the signature. For this reason the name of the testator written at the beginning of the will, but not subscribed to it, is not a sufficient signing. In re Armand's Will, 43 La. Ann. 310, 9 S. R. 50, 7 Am. Pro. R. 361, 367. See also *post*, § 184.

tains most of the valuable papers of the deceased, and which had been left by him with a friend for safe-keeping.¹

The fact that the will is entirely written by the testator may be proved by any of the methods ordinarily employed in proving handwriting. No greater or higher degree of proof is required to prove the handwriting of the deceased under such circumstances, in the absence of statute, than in any case where the character of handwriting is in issue.² A beneficiary under the holographic will is competent to testify that it is in the handwriting of the deceased, though he may not be competent under a statute to testify as a subscribing witness.³

§ 10. Incorporation of non-holographic papers by reference.—The doctrine of the incorporation of extrinsic papers by reference⁴ is applicable to holographic wills. Thus, a holographic will or a codicil may be operative to revoke wholly or in part an existing non-holographic will to which it is attached, or to which, not being attached, it refers.⁵

But it has been said that the reference does not incorporate the earlier will as a part of the holographic will to such an extent that the latter is *not entirely signed, written and dated* by the testator.⁶ To what extent non-testamentary papers *not written by the testator* may be incorporated into the holograph

¹ *Hill v. Bell*, Phill. (N. C., 1867) Law, 122, 125; *Little v. Lockman*, 4 Jones (N. C.), 494. A letter may be a holographic will under the statute. *Alston v. Davis*, 118 N. C. 202, 24 S. E. R. 15. In Montana, under the Probate Practice Act (§ 19, art. 439), a writing in the hand of the deceased in the following form was held a valid holographic will: "What I want is that you should change my will so that she [his wife] will be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I don't know what the laws are in Montana. I don't know what ought to be done, but you do." *Barney v. Hayes*, 11 Mont. 571, 29 Pac. R. 232.

² *Mitchell v. Donohue*, 100 Cal. 203 (1893), 34 Pac. R. 614; *Franklin v.*

Franklin, 90 Tenn. 44, 16 S. W. R. 557.

³ 12 S. R. 349, 45 La. Ann. 207. The declarations of the testator are received to prove that the will is in his writing. *Marvant's Suc'n*, 45 La. Ann. 207 (1893), 12 S. R. 349. Where the testator took a holographic will to a friend to have a clear copy made, and, after destroying the original, attempted to execute the copy so as to make it his will, which attempted execution was ineffectual because of an insufficient attestation, the original should be admitted to probate, though destroyed. *Wilbourn v. Shell*, 59 Miss. 205 (1881), 2 Am. Pro. R. 520, 523.

⁴ § 279.

⁵ *Barney v. Hayes*, 11 Mont. 571, 576.

⁶ *In re Sohler's Estate*, 78 Cal. 477, 21 Pac. R. 8.

is an interesting question, upon which, up to the present time, there are very few decisions in point.

Doubtless, if the extrinsic papers were intelligibly referred to, the court would permit them to be consulted as evidence, not to show the intention of the testator, but to explain his meaning as contained in the holograph. But it is extremely doubtful whether such writings would be admitted to probate as parts of the holographic will, they not being *dated, signed and written* by the hand of the testator.¹

§ 11. Joint wills and mutual wills defined and distinguished.—A joint will is an instrument executed as a will, by two or more testators at the same time, disposing of the property of each to the others, or to the survivor of the others, or to some third party. The validity of this sort of testamentary paper is now beyond dispute. The cases in which joint wills have been sustained in England and America are numerous. On the death of any of the testators, the will, thus executed, may be admitted to probate as *his* last will and testament so far as it disposes of *his* property.²

Mutual wills are distinguished from joint wills. Mutual wills are those in which two or more testators *mutually devise their property wholly or in part to one another*. A will may thus be joint and mutual, and it may be mutual though not joint, and *vice versa*. Two testators may execute one paper jointly, by which the survivor is to take all the property of the other, or they may execute separate papers having the same object in view. The majority of the joint wills mentioned in the cases are mutual wills. But, on the other hand, it is not necessary that a joint will should be a mutual will, and several persons may execute a joint will by which the property of each of them is given to a third person or persons.

¹ See *post*, §§ 282, 284.

² *Schumaker v. Schmidt*, 44 Ala. 410; *Ex parte Day*, 1 Bradf. (N. Y.) 476, 480-485; *In re Raupp*, 81 N. Y. S. 680, 10 Misc. R. 800; *In re Davis* (S. C.), 26 S. E. R. 636; *Betts v. Harper*, 39 Ohio St. 639; *Allen v. Boomer*, 83 Wis. 846, 52 N. W. R. 426. *Contra*, *Clayton v. Livermore*, 2 Dev. & Bat. (19 N. C.) L. 558; *Hobson v. Blackburn*, 1 Adams, 274; *Darlington v. Pulteney*, 1 Cowp. 260.

§ 12. **The probate of joint and mutual wills.**—Ordinarily a joint will may and ought to be probated on the death of each testator, but only so far as it relates to his property. If either testator did not possess testamentary capacity when he joined in the execution of the will, or if he failed to comply with any statutory formality, the will is invalid *as to him, though valid as to his co-testator*. A joint will which by its terms is not to be probated until after the death of both testators is not on that account invalid,¹ for a testator may create estates to commence in the future as well by a joint as by a several will, and, during the life of the surviving testator, the property will be held by the next of kin or heirs of the deceased testator.² A will executed by a husband and wife may be valid as the separate will of the husband, where it appears that the wife owned nothing upon which the will could operate.³ Thus, where husband and wife, joint tenants, make a joint will, each devising his share in the estate in joint tenancy to the other, and the wife dies first, the will of the husband carries his whole estate, though the will of the wife was ineffectual to dispose of her interest.⁴

The acts and declarations of the parties to a will, signed by husband and wife, are received as a part of the *res gestæ*, to show, when the will is offered for probate as the will of the husband, that the wife did not intend that it should be regarded as her will.⁵

§ 13. **The revocation of joint and mutual wills.**—Mutual wills, whether joint or several, are revocable by either testator during the life-time of the others so far as his disposition of property is concerned, without notice to or consent of the others, unless the making of the will is the result of a con-

¹ *Schumaker v. Schmidt*, 44 Ala. 454, 476.

² *In re Raine*, 1 Sw. & Tr. 144. But a joint will by two, making *each* the residuary legatee of the other, after some pecuniary legacies to third parties, which provides that it is not to be admitted to probate until *both are dead*, is impracticable and its provisions must fall. *State Bank v. Bliss*,

85 Atl. R. 255, 67 Conn. 817, 322; *Walker v. Walker*, 14 Ohio St. 157.

³ *In re Rogers*, 11 Me. 303, 306; *Allen v. Allen*, 28 Kan. 18, 24; *Walker v. Walker*, 14 Ohio St. 157.

⁴ *In re Rogers*, *supra*. See *post*, § 52.

⁵ *Chaney v. Home F. & F. Miss. Soc.*, 28 Ill. App. 621, 622. See note on "Probate of joint and mutual wills," 38 L. R. A. 239.

tract by which each has agreed to devise his property to the others.¹

If two testators who have united in the execution of a mutual will have devised their property to each other so that the devisees form a mutual consideration, neither, after the death of the other and the probate of the will as to *his property*, is at liberty, after accepting the benefit conferred, to repudiate the contract to the injury of the heirs or next of kin of the testator who predeceased him.² The mutual will was made upon condition that the whole shall be but one transaction. If the will is not revoked during the joint lives of the testators, he who dies first has a right to rely upon the promise of the survivor. He has fulfilled *his part* of the agreement, and it is not just to his representatives to permit a revocation when he has been prevented from revoking his will by a reliance upon the other's promise. It is too late for the survivor, after receiving the benefit, to change his mind because the first will is then irrevocable. It would have been differently framed, or perhaps not made at all, if it had not been for his inducement.³ And where husband and wife make mutual wills in favor of one another, and subsequently are divorced, dividing the property between them, and the wife revokes her will by destroying it, a revocation of

¹ Schumaker v. Schmidt, 44 Ala. 454, 465; Gould v. Mansfield, 103 Mass. 408, 410; Clayton v. Livermore, 2 Dev. & Bat. (N. C.) 558, 562; In re Vogel's Est., 27 Pittsb. Leg. J. 80. Thus, where brother and sister executed a will which was both joint and mutual, as follows: "I, A. B., should I be the first to die, give, devise and bequeath to the survivor of us all the rest and residue of the decedent's estate, both real and personal, to have and to hold and enjoy the same during the life of the survivor," and directed that, after the expiration of the life estate, the property should go over, the instrument was held revocable by either, and the sister, after the death of the brother, had the right to make a new will disposing of her property, not including what she received under the will for life only.

In re Cowley's Est., 136 Pa. St. 628, 633, 20 Atl. Rep. 567.

² Ide's Executors v. Clark, 5 Ohio Cir. Ct. R. 239; Bynum v. Bynum, 11 Ired. (33 N. C.) L. 632; Edson v. Parsons, 85 Hun, 263, 32 N. Y. Supp. 1036; Dufour v. Pereira, 1 Dick. (Eng.) 419.

³ Whether the probate courts whose jurisdiction is limited by statute have power to deny probate to a will upon the ground that it is a mutual will, and that the party who is to benefit by it, and in reliance upon whose promise it was made, has revoked his will, may well be doubted. The person aggrieved has his remedy against the executor in a court of law for money received, or in a court of equity by specific performance, as in the case of a contract to make a will. See §§ 286, 287.

the will of the husband will be implied from the alteration in the circumstances of the parties.¹ So mutual wills made by two sisters, *each* devising all her property to the other, are revoked as to the will of either on her marriage, though the sister marrying dies without issue in the belief that her will was unrevoked.²

§ 14. **From what time a will speaks.**—Under the operation of modern statutes it is the general rule that a will speaks as of the death of the testator, in the absence of a clear indication of his intention that any part of it shall refer to another period. Thus, if the testator speaks of "his children," or of "the children of A.," he will be presumed to mean those persons who correspond to that description at his death. A reference to property owned by the testator will, under existing statutes, conclusively be presumed to mean the property he possesses at his death. But the rule is one of intention, and readily yields to expressions showing that the testator refers to things or persons as they exist at the date of the will.³

§ 15. **Words referring to the present time.**—The statutory rule that a will shall operate as though executed *immediately prior to the death of the testator* is subordinate to the expression of a contrary intention. He may, by proper language, cause the will to speak as of the date of its execution. This occurs where he uses words indicative of present time, either in reference to the subject or object of a devise or legacy. For if the testator refers to a condition of things as *now existing*, he will

¹ *Lansing v. Haynes*, 95 Mich. 16, 21. See *post*, § 265.

² *Hale v. Hale*, 90 Va. 728, 19 S. E. R. 739; *post*, § 285.

³ See *post*, § 15; *Updike v. Tompkins*, 100 Ill. 406; *Bradford v. Mathews*, 9 App. D. C. 433; *Amos v. Amos*, 117 Ind. 19 (1888), 19 N. E. R. 539; *Harris v. Carpenter*, 109 Ind. 540, 544; *Brown v. Gritchell*, 110 Ind. 31, 41; *Heilman v. Heilman*, 129 Ind. 59, 64; *In re Goldthorpe*, 94 Iowa (1895), 338, 339; *Stephenson v. Stephenson*, 64 Iowa (1884), 537; *Rowen v. Evans*, 70 Iowa (1886), 368; *Briggs v. Briggs*, 69 Iowa, 617, 619, 29 N. W. R. 632; *Hosea v. Jacobs*, 98 Mass. 65, 67; *Garrison v.*

Garrison, 25 N. J. L. 153; *Graves v. Graves*, 90 Wis. 306, 63 N. W. R. 271; *Inhabitants v. Bruch*, 37 N. J. Eq. 482, 485; *Hutchinson v. Barrow*, 6 H. & N. 583; *Wilde v. Holtzmeier*, 5 Ves. 816. A will is of course inadmissible as evidence of title during the life of the testator, *Thompson v. Thompson*, 30 Neb. 489, 46 N. W. R. 638; but, though it does not become effectual until probated, yet when proved it relates back to the death of the testator so as to vest title immediately upon that event. *Graves v. Graves*, 90 Wis. 306, 63 N. W. R. 271; *Coggeshall v. Home*, 18 R. I. 696, 31 Atl. R. 694. See also note to 1 L. R. A. 342.

be presumed to refer to the condition as it exists at the date of the execution of the will. He cannot, where he uses words of present time, be referring to matters existing at his death, which, when he makes his will, is wholly a prospective, not a past or a present, event.¹ As examples of this exception to the rule may be mentioned a gift to "*my present physician*,"² a direction to pay A.'s "*present debts*,"³ a gift to the children or descendants of A. "*now living*,"⁴ a gift of a house or of property "*now owned*,"⁵ or *now occupied*,⁶ or where I *now reside*,⁷ or where he gives freehold land of which I am *now seized*.⁸

A gift to the *youngest* child of A. means him who is the youngest at the date of the will.⁹ So, a devise to my nephews and nieces, "*living in various parts*" of the country, with a direction to the executors to communicate with them, means those *living at the date of the will*, to the exclusion of the children of those deceased.¹⁰ And the same construction has been applied to a gift to the "*surviving children of A. living*" in Maine.¹¹

¹ Gold v. Jordan, 21 Conn. 16; Everett v. Carr, 59 Me. (1871), 325, 333; Walls v. Walls (Pa., 1897), 37 Atl. R. 859.

² Everett v. Carr, 59 Me. 325, 333.

³ St. John v. Daun, 66 Conn. 401 (1895), 34 Atl. Rep. 100.

⁴ Crossley v. Clare, Amb. 397; Abney v. Miller, 2 Atk. 593; *post*, § 552.

⁵ Ross v. Ross, 12 B. Mon. (51 Ky., 1851), 438; Quinn v. Hardenbrook, 54 N. Y. 88; Board v. Ladd, 26 Ohio St. 210; *post*, § 305.

⁶ Hutchinson v. Barrow, 6 H. & N. 583.

⁷ Cole v. Scott, 16 Sim. 259, 1 M. & G. 519.

⁸ Lilford v. Keck, 30 Beav. 300. See also for examples of the use of words of present time, In re Midland R. R. Co., 34 Beav. 525; Hepburn v. Skirving, 4 Jur. (N. S.) 651, and *post*, §§ 304, 305.

⁹ Butler v. Butler, 8 Barb. Ch. (N. Y.) 304.

¹⁰ In re Morrison, 139 Pa. St. 306, 20 Atl. R. 1057; *post*, § 598.

¹¹ Morse v. Morse, 11 Allen (Mass.),

36. A devise to the wife or husband of A. means the person who is the wife or husband at the date of the will, in the absence of a contrary intention. A gift to the servants of the testator may mean those who are his servants at his death or at the execution of the will, according to the context. See *post*, § 604. It should be noted in connection with the subject discussed in the text that the rule that a will speaks either from its date, or from the death of the testator, applies exclusively to the ascertainment of the character and extent of the property which passes by it and to the persons who are to take that property. It does not apply to the legal rules by which its language is to be construed, though the construction shall take place long after the death of the testator. Those rules of law or of equity which are in force when the construction of the will becomes necessary are applied, though they have been formulated by the courts long subsequent to the death of the testator. For the

§ 16. **The legislative control of the testamentary power.**—The right to make a disposition of property by will is neither a natural, nor, in the United States, a constitutional right. It is solely the product of statutory enactment in the case of real property, and of judicial legislation in the case of personal property.¹ We can point out the exact date upon which it was created. The testamentary privilege, and its extent and limitation, depend wholly upon statute, not only as to their existence, but as to the mode in which it may legally be exercised. The legislature, both in England and the United States, has repeated prescribed to whom property may be given by will, how much may be disposed of by will in particular cases, and what species of interest will be wholly exempt from testamentary disposition.² And as the legislature has conferred the power, so the legislature may restrain its operation, confine it to particular classes of persons, or abolish it altogether, so far as the wills of persons who die after the enactment of the statute are concerned.³

§ 17. **The retrospective action of statutes which regulate the formalities of execution, where a statute is passed prior to death of testator.**—Upon the question whether the validity of the execution of a will is to be determined according to the statutory regulations existing at the date of its execution, or according to those existing at the date of the death of the testator, a lack of harmony in the authorities prevails. In the first place it should be noted that every statute is to be interpreted so as to act *prospectively* and not *retrospectively*, unless the language of the statute itself making its action retrospective is so clear as to preclude all doubt as to the legislative intent.

Doubtless it is within the scope of the authority of the legislature to enact statutes regulating the execution of wills, which shall, by their terms, operate retrospectively upon wills executed prior to their enactment.⁴ The legislature may by stat-

judicial determination of rules of law, though uttered after the death of the testator, is, it is hardly necessary to state, assumed to be, not the promulgation of any new principles which were non-existent prior thereto, but rather merely a declara-

tion or reiteration of what the law always has been from the beginning of time.

¹ See note, § 5.

² *Post*, § 46 et seq.

³ *Post*, §§ 17-21.

⁴ Thus, a statute providing that,

ute modify and alter the formalities which attend execution; and may, by appropriate language, prescribe that the provisions of a statute shall apply to wills executed prior to its enactment, validating or invalidating them as may happen.

In the case of a statute which is by its express language retroactive, no difficulty is experienced. But where the statute is silent, two views involving widely divergent theories of the testamentary power are held. Those courts which uphold the proposition that the validity of the execution of a will is to be determined by the statute *as it exists at the death of the testator*, and not according to the statute as it existed at the *date of the execution of the will*, argue that, as the instrument which has been executed is not effectual until the death of the testator, and as no rights or interests can by any possibility vest under it during his life, it is a mere inchoate act, which is not only revocable by the testator, but the effect of which may be destroyed by the legislature as well.¹

Those cases, on the other hand, which refuse to give a retrospective action to statutes regulating the formalities of execution, point out that the act of disposing of property by will is a completed act *as soon as the formalities of execution are complied with*, though no title may vest until a future time. So it is highly unjust to the testator to say to him, in effect, that if he would make a valid will, he must do things, and follow strictly rules prescribed by statute; and, after he has strictly and faithfully performed all that is required of him, to disappoint his purpose by subsequent statutory regulations, not expressly retroactive. Hence, if a will is valid according to the statute in existence at its execution, it cannot be invalidated by the subsequent modification or repeal of such statute, unless it is clear that the repealing statute was intended by the legis-

whenever a person *has directed* that land shall be sold by his executors, a sale by the survivors shall be valid, is expressly retrospective, and applies to all wills made and admitted to probate. *Bredenberg v. Bardin*, 36 S. C. 197, 15 S. E. R. 372.

¹ In *re* *Learnard*, 70 Cal. 140 (1886), 11 Pac. R. 587; *Estate of Barker*, Myr. Prob. (Cal., 1875), 78, 79; In *re* *Tuller*, 79 Ill. 99 (1875); *Draper v.*

Morris, 137 Ind. 169; *Lawrence v. Hebbard*, 1 Bradf. 252; *Houston v. Houston*, 3 McCord, Law (S. C., 1826), 491; *Elcock's Will*, 4 McCord, Law, 39, 44; *Sutton v. Chenault*, 18 Ga. 1; *Hargroves v. Redd*, 43 Ga. 142; *Wakefield v. Phelps*, 87 N. H. 295; *Langley v. Langley*, 18 R. I. 618, 30 Atl. R. 465; *Hasluck v. Pedley*, L. R. 19 Eq. 271.

lature to operate as a statutory revocation of all wills executed prior to its passage.¹

§ 18. Statutes providing that the marriage of the testator shall revoke are not retroactive.—The common-law rule that marriage alone does not revoke a will made prior thereto is in some states abolished by statutes which provide that a man's will shall be revoked by his subsequent marriage.² The courts, construing these statutes, have refused to give them a retrospective effect, but have uniformly held that their provisions are applicable solely to marriages which take place *after* they have taken effect.³

§ 19. Disposition of property according to law means law existing at the testator's death.—Where the testator directs a distribution of his property according to law, or among those persons who would take it as next of kin under the statute, he is *presumed to mean the law or statute as it exists at the date of his death*. And this presumption becomes irresistible when he further states that the distribution is to be made "as though this last will and testament had not been made."⁴

§ 20. Effect of statutory enactment subsequent to the death of the testator.—The title to the property which the legatees are to take under the will, provided it shall be valid, is vested *sub modo* in them at and by the death of the testator, and is confirmed by the probate of the will. If the will is in-

¹ Gaylor's Appeal, 43 Conn. 82; a remedial statute only in the sense Goodsell's Appeal, 55 Conn. 171; that all statutes are passed because Lane's Appeal, 57 Conn. 182, 17 Atl. R. 926; Giddings v. Turgeon, 58 Vt. 106, 4 Atl. R. 711; Mullen v. McKelvy, 5 Watts (Pa.), 399; Murry v. Murry, 6 Watts (Pa.), 353; Taylor v. Mitchell, 57 Pa. St. 209; Downing v. Townsend, 1 Amb. 280; Gillmore v. Shooter's Ex'r, 2 Mod. 310.

² Post, §§ 235, 239.

³ In re Tuller, 79 Ill. 99; Goodsell's Appeal, 55 Conn. 171, 10 Atl. R. 557; Swan v. Sayles, 42 N. E. R. 570, 165 Mass. 177. "All statutes are to operate prospectively unless they contain language unequivocally and certainly retrospective. The above statute (Sess. L. 1883, ch. 110, § 135) looks forward, not backward. It is

⁴ Meserve v. Meserve, 63 Ma. 518, 521. See post, § 606 et seq.

valid, so that the deceased dies intestate, his death vests in his heirs and next of kin a title to his property as of the date of his death which is absolute and indefeasible. In either event property rights have vested which are beyond the control of the legislature and cannot be divested by it.¹ Thus, where a corporation at the death of the testator is incapable of taking a legacy, and the testator is to that extent intestate, the property vests in the next of kin absolutely, and the corporation cannot, by a statute enacted after the death of the testator, acquire the capacity to take the legacy.²

§ 21. Statutory regulations as to property acquired after the execution of the will.—The common law, as elsewhere pointed out, regarded a will devising real property as a conveyance speaking only from the date of its execution, and not as effectual to transfer the title to real property subsequently acquired by the testator.³ This rule has been abolished by statute in England and in almost every state of the Union.⁴ These statutes in substance provide that all property, real as well as personal, acquired by the testator after the execution of the will shall pass under it, if that appears to be the intention of the testator. It has been generally, though not universally, held that these statutes are applicable to wills executed prior to the date of their passage, even when the language of the statute is not expressly retrospective.⁵

§ 21a. The determination of survivorship in case of death by same disaster.—The existence of a presumption of survivorship based either upon age, sex or physical condition, where

¹ Deake's Appeal, 80 Me. 51, 12 Atl. R. 790; Remington v. Metro. Sav. Bank, 76 Md. 546, 25 Atl. R. 666; Lynch v. Paraguay, L. R. 2 P. & D. 268.

² White v. Howard, 46 N. Y. 144; Hartson v. Elden, 50 N. J. Eq. 522, 528.

³ Post, §§ 60-64.

⁴ Post, § 62.

⁵ Cushing v. Aylwyn, 12 Met. (Mass.) 169; Winchester v. Foster, 3 Cush. (Mass.) 366, 371; Wilson v. Wilson, 6 Md. 487, 488; Alexander v. Worthington, 5 Md. 471; Condict v. King, 18

N. J. Eq. 375; Loveren v. Lamprey, 22 N. H. 434; De Peyster v. Clendenning, 8 Paige (N. Y.), 295; Smith v. Jones, 4 Ohio, 115; Welborn v. Townsend, 31 S. C. 408; Van Tilburgh v. Hollinshead, 14 N. J. Eq. 36; Hamilton v. Flinn, 21 Tex. 713. *Contra*, Mulloch v. Souder, 5 Watts (Pa.), 198; Gable v. Daub, 40 Pa. St. 217; Battle v. Speight, 9 Ired. (N. C.) Law. 288; Brewster v. McCall, 15 Conn. 274, 289; Roberts v. Elliot, 3 T. B. Mon. (Ky.) 395; Willis v. Watson, 4 Scam. (Ill.) 64; Parker v. Bogardus, 5 N. Y. 309; Morgan v. Huggins, 42 Fed. R. 869.

several persons perish in the same disaster, has been much discussed. If a testator and a beneficiary perish in a shipwreck, or in a burning house, under circumstances which render it impossible to ascertain which died first, it is difficult to say whether the legacy has vested or has lapsed. The ecclesiastical courts in England adopted the presumption that the testator and the beneficiary perish *precisely at the same moment*, and that the testator was therefore intestate as to the legacy.¹ But the modern rule is that in the absence of statute, where several persons perish by the same disaster, the question which survived the others must be determined as a question of fact upon all the particular circumstances of the case. The age, strength and sex of the parties, their mental and physical conditions, the character of the disaster, and all facts which are ascertainable, are to be considered. If the evidence is insufficient to determine which survived, it will be presumed that all died at the same moment and property rights will be administered accordingly.² Thus, where husband and wife, after making wills by which each appointed the other a universal legatee and executor, sailed upon a ship which was never afterwards heard of, and which must have been lost with all on board, and there was no evidence that either survived the other, letters of administration, with the will annexed, should be made to one of the next of kin of each.³

¹ *Wright v. Samuda*, 2 Phil. 266, *Newell v. Nichol*, 75 N. Y. 445, 460, 277; *Taylor v. Diplock*, 2 Phil. 261, 465.

² *In re Alston* (1892), Prob. 142; *Underwood v. Wing*, 19 Beav. 459, 4 De

Gex, M. & G. 633, 657; *Wing v. Angrave*, 8 H. L. C. 183, 198; *Rhodes v. Rhodes*, L. R. 36 Ch. D. 586; *Kansas, etc. Co. v. Miller*, 2 Colo. 442; *Russell v. Hallett*, 23 Kan. 276, 279; *Fuller v. Linzee*, 185 Mass. 468; *Coye v. Leach*, 41 Am. Dec. 523, 525, 8 Met. (Mass.) 371; *Johnston v. Merithew*, 80 Me. 111, 13 Atl. Rep. 132; *Cowman v. Rogers*, 78 Md. 403; *In re Ridgway*, 4 Redf. (N. Y.) 226; *Stinde v. Ridgway*, 55 How. Pr. (N. Y.) 801; *Robinson v. Gallier*, 2 Wood, C. C. 178;

³ *In the Goods of Alston*, L. R. P. D. (1892), 142, 143. Each of three sisters who perished in the same disaster made a will leaving her property to the others, directing that *after the death of the survivor* legacies should be paid to A. and B. It being impossible to tell which had died first, it will be presumed that all died simultaneously. Though the legacies will be paid, the testatrices are intestate as to the residue of their estates. *In re Wilbur* (R. L., 1897), 37 Atl. R. 634. The testator devised land to A. for life, remainder to A.'s children in fee, and he and A. and his

children perished in the same fire. It appeared that the testator, who was ill and aged, slept in a room in which a fire was burning in an unsafe stove; that he was in the habit of getting medicine in the night from a closet, using a candle for that purpose; that the fire was under the greatest headway in his room, and his body was found under the ruins of the closet. The body of A., who was in the habit of waiting on the testator in the night, was found near the door of the testator's room, and his cries were heard by others in the house. The remains of his children and their mother were found near a window which was further from the room in which the fire evidently originated than the spot where A. was found. The court held that the testator probably died first, then A., and last of all *his children*, and that the property went to *their* heirs and not to A.'s heirs. In re Ehle, 73 Wis. 445, 41 N. W. R. 627.

CHAPTER II.

THE CONFLICT OF LAWS, INCLUDING THE LAW OF DOMICILE.

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| <p>§ 22. Devises are regulated by <i>lex loci rei sitæ</i>.</p> <p>23. Gifts of personalty governed by the law of the domicile of the testator.</p> <p>24. The conflict of laws as to bequests in lieu of dower.</p> <p>25. Conflict of laws as to wills executing powers.</p> <p>26. The meaning of words descriptive of persons is determined by <i>lex domicilii</i>.</p> <p>27. The conflict of laws as to perpetuities.</p> <p>28. The conflict of laws as to devises of real property in trust for sale and distribution.</p> <p>29. Contracts to make wills.</p> | <p>§ 30. Foreign laws not judicially noticed — Mode of proving foreign statutes.</p> <p>31. Residence and domicile distinguished.</p> <p>32. The presumption of a continuance of domicile — A change of residence and an intention must coincide.</p> <p>33. The effect of residence abroad in governmental employ.</p> <p>34. Effect of a change of residence for the sake of health.</p> <p>35. The domicile of married women and minors.</p> <p>36. The declarations of the testator as evidence of domicile.</p> |
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§ 22. Devises are regulated by *lex loci rei sitæ*.—The validity of a devise of real property, both as regards the power and testamentary capacity of the testator, and the form and mode in which the will is executed, is to be determined solely and exclusively according to the law of the place where the land devised is situated.¹

¹ Story, Conf. Laws, § 474; 2 Greenl. Ev., § 670; Ware v. Wisner, 50 Fed. R. 310; Varner v. Bevil, 17 Ala. (1850), 286; Morris v. Harris, 15 Cal. 226, 252; Irwin's Appeal, 33 Conn. 128; Rickards v. Miller, 63 Ill. (1872), 417; Hays v. Ernst, 32 Fla. 18, 13 S. R. 451; Frazier v. Boggs (Fla., 1896), 20 S. R. 245; Bland v. Bland, 103 Ill. (1882), 12; Thieband v. Sebastian, 10 Ind. (1858), 454, 456; Calloway v. Doe, 1 Blackf. (Ind., 1825), 371, 372; Otto v. Doty, 61 Iowa, 23, 25, 15 N. W. R. 523, 578; Robertson v. Barbour, 6 Mon. (22 Ky.) 523; Sevier v. Douglas, 44 La. Ann. 605; Crofton v. Illsley (1820), 4 Me. 134; Potter v. Titcomb, 22 Me. 300; Dupuy v. Standard Min. Co., 88 Me. 202, 33 Atl. R. 976; Cornelison v. Browning, 10 B. Mon. (49 Ky.) 425; Campbell v. Sheldon, 13 Pick. (30 Mass.) 8; Davis v. Estey, 8 Pick. 476; Cutter v. Davenport, 1 Pick. (18 Mass.) 81, 86; Procter v. Clark, 154 Mass. 45, 48, 27 N. E. R. 673; Fay v. Haven, 3 Met. (44 Mass.) 109, 116; Lincoln v. Perry, 149 Mass. 368, 373; Goodall v. Marshall, 11 N. H. (1839), 88, 93; Schults v. Pulver, 3 Paige (N. Y., 1832), 182; White v. Howard, 46 N. Y. 144; Hawley v.

§ 23. Gifts of personalty governed by the law of the domicile of the testator.—The general rule as regards personal property is that its disposition by will is governed by the law of the testator's domicile. In other words, the capacity and the legal power of a testator to dispose of his personal property, and the validity of the disposition, so far as the form and manner of its execution are concerned, are to be determined according to the rules of law which prevail in that place or country which is his domicile when he dies.¹

James, 5 Paige (N. Y., 1835), 337; In re Long, 9 Misc. R. 521, 30 N. Y. Supp. 388; Merritt v. Corties, 24 N. Y. S. 561, 71 Hun, 612; In re Braithwaite, 19 Abb. N. C. 113; Vogel v. Lehritter, 139 N. Y. 223; Stent v. McLeod, 2 McCord (N. C., 1827), Eq. 354; Leake v. Gilchrist, 2 Dev. (13 N. C., 1829), 73; McCune v. House, 8 Ohio (1837), 144, 145; Penfield v. Tower, 1 N. D. 216, 46 N. W. R. 413; Baily v. Baily, 8 Ohio, 239; Carpenter v. Bell (Tenn., 1896), 34 S. W. R. 209; Williams v. Saunders, 5 Cold. (Tenn.) 60; Morrison v. Campbell, 2 Rand. (Va.) 209; Bolling v. Bolling, 88 Va. 524, 14 S. E. R. 67; Robertson v. Pickrell, 109 U. S. 608; Kerr v. Moon, 9 Wheat. (20 U. S., 1822), 565; Darby v. Mayer, 10 Wheat. (U. S.) 465; High's Appeal, 1 Doug. (Mich., 1847), 515, 522; Wilt v. Cutler, 38 Mich. 189; Thrasher v. Ballard, 33 W. Va. 285, 10 S. E. R. 411; Nelson v. Potter, 5 N. J. Eq. 324, 15 Atl. R. 375; Ford v. Ford, 33 N. W. R. 178, 70 Wis. 19; Coppin v. Coppin, 2 P. W. 291; Gambier v. Gambier, 7 Sim. 263, 270; Bovey v. Smith, 1 Vern. 85; Brodie v. Barry, 2 V. & B. 181; Freke v. Lord Carbery, L. R. 16 Eq. Cases, 461.

¹ Johnson v. Copeland, 35 Ala. 521; Richards v. Miller, 62 Ill. 417; Bloomer v. Bloomer, 2 Bradf. (N. Y.) 829; Williams v. Kimball, 35 Fla. 49, 16 S. R. 788; Hall v. Ernst, 32 Fla. 18, 13 S. R. 451; Atchison v. Lindsay, 6 B. Mon. (45 Ky., 1846), 86; Dorsey v. Dorsey, 5 J. J. Marsh. (28 Ky., 1830), 280; Barnes v. Brashear, 2 B. Mon. (41 Ky.) 330, 382; Irving v. McLean, 4 Blackf. (Ind., 1838), 52; Berthelot v. Fitch (La.), 10 S. R. 867; Abston v. Abston, 15 La. Ann. 137, 139; Gilman v. Gilman, 52 Me. (1864), 165; Potter v. Titcomb, 22 Me. 300; Hunter v. Bryson, 5 Gill & J. (Md., 1833), 483, 488; Jenison v. Hapgood, 10 Pick. (27 Mass.) 77, 100; Sewall v. Wilmer, 132 Mass. 181, 187; Fellows v. Minor, 119 Mass. 541, 544; Cutter v. Davenport, 1 Pick. (18 Mass., 1882), 81; Fay v. Haven, 3 Met. (44 Mass.) 109; Campbell v. Sheldon, 18 Pick. (30 Mass.) 8; Applegate v. Smith, 31 Mo. 166; Garland v. Rowan, 2 Sm. & M. (10 Miss.) 617; Nat v. Coons, 10 Mo. 543; Stewart v. McMartin, 5 Barb. (N. Y.) 438, 441; Chamberlain v. Chamberlain, 43 N. Y. 424; Cross v. Trust Co., 181 N. Y. 332, 30 N. E. R. 125; Bascom v. Albertson, 34 N. Y. 584; Simonson v. Waller, 41 N. Y. S. 662; Banta v. Moore, 15 N. J. Eq. 97, 101; Harrall v. Harrall, 39 N. J. Eq. 279, 287; Jenkins v. Trust Co. (N. J. Eq., 1896), 33 Atl. R. 202, 210; Meese v. Keefe, 10 Ohio, 362; Scaringen v. Morris, 14 Ohio St. 424; Desesbats v. Berquier, 1 Binney (Pa., 1808), 336, 2 Am. Dec. 448; Hill v. Townsend, 24 Tex. 575; Walton v. Hall, 66 Vt. 455; White v. Tennant, 31 W. Va. 790; Ford v. Ford, 70 Wis. 19, 45; Dixon v. Ramsey, 3 Cranch (1806), C. C. 319; Kerr v. Moon, 9 Wheat. (U. S.) 565; McCormick v. Sullivan, 10 Wheat. (U. S.) 192; Ennis v. Smith, 14 How. (U. S.) 400; Smith v. Union Bank, 5 Peters (U. S.), 518;

The rule that a will of personal property in order to be valid must be executed according to the law of the testator's domicile at the date of his death may operate to bring about a revocation of a valid will of personalty which was executed in strict conformity with the law of the place where it was executed. For suppose that the testator, after the valid execution of a will in one domicile, abandons it, and acquires a new one in which a different mode of executing a will is followed. Such a change in domicile on his part will operate as a revocation of his will unless it is re-executed by him in accordance with the statutory requirements which prevail in the new domicile.¹

Grattan v. Appleton, 3 Story C. C. Laws (1876), p. 93, § 2. In a recent 755; *Harrison v. Nixon*, 9 Peters New York case it was held that, in- (U. S.), 483; *Sickles v. New Orleans*, asmuch as the validity of bequests of personal property is determined 80 Fed. R. 868; *Bempde v. Johnston*, exclusively by the law of the testa- 3 Ves. 198; *Somerville v. Somerville*, tor's domicile, the New York courts, 5 Ves. 750, 786; *Price v. Dewhurst*, 8 being unable to administer a trust 31m. 289; *Countess of Ferraris v. involving the disposition of a fund Hertford*, 3 Curt. 468, 7 Jur. 262; for charitable purposes because it Bruce v. Bruce, 2 Bos. & P. 229; *Bal- contravened the local statutory rules four v. Scott*, 6 Bro. P. C. 550; *Rol- against perpetuities, and because the lins v. Dolphin*, 1 Swabey & Tr. 37, 7 beneficiaries of the trust were not H. L. Cases, 390; *Stanley v. Bernes*, definitely ascertained, might cause 3 Hagg. 373; *Moore v. Darrell*, 4 id. the funds within its jurisdiction to 346; *Bernal v. Bernal*, 3 My. & Cr. be remitted to the executors at the 559; *In re Osborne*, 1 Deane, 4; *Bre- domicile of the testator, to be admin- mer v. Freeman*, 10 Moo. P. C. 306; istered by the laws of that place. Yates v. Thomson, 3 Cl. & Fin. 544, The statutes of any state against 570, 585, 1 Sh. & McL. 795, 835; *Eno- perpetuities have no extraterritorial hin v. Wylie*, 10 H. L. Cases, 1; *Polin- force, and hence the fact that a be- ger v. Wightman*, 3 Mer. 59; *An- quest which is valid according to the struthers v. Chalmers*, 3 Sim. 1; law of the foreign domicile is not Crispin v. Dogliani, 8 Jur. (N. S.) 653; valid under the statute of New York Eames v. Hacon, L. R. 16 Ch. Div. is not material, and should not be 407; L. R. 18 Ch. Div. 847; *Story, Conf. permitted to defeat the intention of Laws*, § 465.

¹ *Moultrie v. Hunt*, 28 N. Y. (1861), 394, 401. See also, as to the effect of change of domicile after the execution of a will, *Dupuy v. Wurtz*, 53 N. Y. (1873), 556, 564-574; *Hyman v. Gaskins*, 5 Ired. (N. C.) 267; *Desesbats v. Berquier*, 1 Binn. (Pa., 1808), 336. In England and in some of the states it is provided by statute that no will shall be revoked by reason of any change of domicile after execution. 24 and 25 Vict., ch. 114, § 8; New York

Laws (1876), p. 93, § 2. In a recent New York case it was held that, inasmuch as the validity of bequests of personal property is determined exclusively by the law of the testator's domicile, the New York courts, being unable to administer a trust involving the disposition of a fund for charitable purposes because it contravened the local statutory rules against perpetuities, and because the beneficiaries of the trust were not definitely ascertained, might cause the funds within its jurisdiction to be remitted to the executors at the domicile of the testator, to be administered by the laws of that place. The statutes of any state against perpetuities have no extraterritorial force, and hence the fact that a bequest which is valid according to the law of the foreign domicile is not valid under the statute of New York is not material, and should not be permitted to defeat the intention of the testator. So far as the foreign law is identical with the law of this state, and so far as it does not contravene any rule of public policy, the courts of New York will carry into effect a testamentary disposition executed in another jurisdiction. If this is impossible, the property may be sent to that forum which will effectuate the will. *Dammert v. Osborn*, 85 N. E. R. 407, 140 N. Y. 30.

§ 24. The conflict of laws as to bequests in lieu of dower. A bequest of personal property to a widow who is entitled to dower in real property located in another state is regulated by the law of the domicile in determining whether it is in lieu of dower. If, by the law of the domicile, it is required that the intention that a bequest shall be accepted in lieu of dower must be expressed in words or clearly shown, the bequest will not be in lieu of dower, though by the *lex loci rei sitae* every provision in personal property for the widow is presumed to be in lieu of dower unless the contrary appears by a writing signed by the testator.¹

§ 25. The conflict of laws as to wills executing powers.—The question arises, in the case of a will, or deed executed in pursuance of a power of appointment contained in a will, whether the validity of the execution of the power is to be determined according to the law of the domicile of the original testator and donor of the power, or according to that of the donee of the power. The rule is that the law of the domicile of the original testator prevails, upon the theory that the appointor of the power is merely the instrument by means of which the donor designates the appointee; and that the latter takes from the donor under the original will and not under the appointment by the appointor.² The will of a person which is valid by the *lex domicilii*, and is sufficient and was intended to pass all the movable property which that person could possess, is an effectual execution of a general power of appointment over pure personalty. And it is not material that the money appointed was the proceeds of and was liable to be re-invested in land elsewhere.³

¹ *Bolling v. Bolling*, 88 Va. 524 (1891), 14 S. E. R. 67. See also *post*, §§ 749-752. *D'Huart v. Harkness*, 34 Beav. 324, 328. A power to dispose of land by last will and testament, or by an instrument in the nature of a will executed in the presence of two witnesses, is properly executed by a holographic will valid by the law of the testator's domicile. *Olivet v. Whitworth*, 83 Md. 258, 33 Atl. R. 723.

² *Van Wert v. Benedict*, 1 Bradf. (N. Y.) 114; *Sewall v. Wilmer*, 132 Mass. 131, 138; *Bingham's Appeal*, 64 Pa. St. 345 (1870); *Cotting v. De Sarriges*, 17 R. I. 668, 671, 24 Atl. R. 530; *In re Hallyburton*, L. R. 1 P. & D. 90; *Tatnall v. Hankey*, 2 Moo. P. C. 342; *In re Alexander*, 6 Jur. (N. S.) 354, 29 L. J. P. & M. 93; *In the Goods of Huber* (1896), Prob. 209, 213. *Cf.* *In re Harman*, 8 Reports, 549, 3 Ch. 607.

§ 26. The meaning of words descriptive of persons is determined by *lex domicilii*.—The general rule that the language of a bequest of personal property is to be construed according to the laws of the domicile of the testator at the date of his death¹ is applicable to a bequest of personal property to his heirs at law, or to the heirs of another person.² A testator, born and domiciled in England during his whole life, would indubitably mean, by a gift of personal property to his heir, some person who would in nowise answer to the *descriptio personæ*, if the testator had been born and domiciled in France, Germany or the United States. In framing his language disposing of his personal property, the testator is conclusively presumed to have had in mind the rules of law which are recognized in the place where he is domiciled, unless it shall clearly appear from the will itself that he desired and intended that his language should be construed according to the rules of another place. And this presumption is not rebutted or controlled by the fact that, in bequeathing personal property, he employs phraseology which is more appropriate to real property.³ But in Massachusetts it has been held that the words "heirs at law," in a gift of personal property, are to be construed according to the law of the *place in which the will was executed*, and not according to the law of the place in which the testator was domiciled at his death.⁴

§ 27. The conflict of laws as to perpetuities.—Where it becomes necessary to determine the question whether a devise of land is invalid because it is in conflict with the rule against perpetuities, it is necessary to invoke the rules of law which are in operation in the country in which the land devised is located.⁵

¹ *Ante* § 23.

² See *post*, § 606 et seq., as to heirs as purchasers.

³ *Harrison v. Nixon*, 9 Peters, 488, 504 (34 U. S., 1835).

⁴ *Proctor v. Clark*, 154 Mass. 45, 27 N. E. R. 673; *Lincoln v. Perry*, 149 Mass. 368, 373 (1889), 21 N. E. R. 671; *Codman v. Krell*, 152 Mass. 214, 25 N. E. R. 90. See also *Potter v. Titcomb*, 22 Me. (9 Shep., 1848), 800; *Richards v. Miller*, 62 Ill. (1872), 417. The meaning of the words in a will

must be construed according to the law of the testator's domicile so far as that is consistent with the law of the state in which it is offered for probate. *Keith v. Eaton*, 58 Kan. 732, 51 Pac. R. 271.

⁵ *Chamberlain v. Chamberlain*, 43 N. Y. 424, 484; *White v. Howard*, 46 N. Y. 144; *Knox v. Jones*, 47 N. Y. (1872), 380; *Brewer v. Brewer*, 72 N. Y. (1878), 603; *Hobson v. Hale*, 95 N. Y. 588; *Ford v. Ford*, 70 Wis. 19, 62-69. And terms for years are within the

The disposition of personal property is governed by the law of the domicile of the testator. Hence if a bequest does not, according to that law, offend the rule against perpetuities, it is valid everywhere, though it would not be valid in the state in which it is to be administered.¹

§ 28. The conflict of laws as to devises of real property in trust for sale and distribution.—Where land located in one state is devised to trustees for sale and distribution of the proceeds in another, the validity of the testamentary disposition will be determined by the *lex loci rei sitæ* so long as the proceeds of the land retain their character of realty. When the proceeds of the sale are remitted to a state under whose laws the trust would be invalid, and the trustees have a discretionary power either to reinvest the fund in land located there or to retain it in money, the law of the place where the original land was located will govern, until, by the exercise of their discretion, the trustees have decided not to reinvest in land.² Hence a disposition of personal property in trust, which is valid according to the law of the domicile of the testator, will be respected and confirmed by the courts of another state, where the beneficiaries of the trust fund are domiciled, though if the testator had been *domiciled in the latter state* his will would have been invalid as violating the rule against perpetuities.³

§ 29. Contracts to make wills.—The validity of a contract to bequeath or devise will be determined according to the law of the forum in which its enforcement is sought. Thus, an oral agreement to leave property, which is valid according to the law of the state in which it was made, will not be enforced in

above rule. *Freke v. Carberry*, L. R. 16 Eq. 461; *In re Gentili*, Ir. Eq. 9 Eq. 541.

¹ *Knox v. Jones*, 47 N. Y. 380; *Watson v. Hall's Estate*, 66 Vt. (1894), 455; *Cross v. U. S. Trust Co.*, 181 N. Y. 832.

² *Butler v. Green*, 16 N. Y. Supp. 888, 19 N. Y. Supp. 890. Where land in Italy was devised by an Englishman domiciled there by a will executed in England upon trust for sale and to reinvest the proceeds upon trusts,

the validity of the latter trusts is determined by the English law. Before the sale of the land the persons who are to receive the income must be determined according to the law of Italy. *In re Piercy*, 1 Ch. 88 (1895), 13 Reports, 106.

³ *Cross v. United States T. Co.*, 131 N. Y. 330, 332, 30 N. E. R. 125; *Whitney v. Dodge*, 105 Cal. 192 (1888), 33 Pac. R. 636.

a state where it is sued upon, if by the law of the latter state such agreements are required to be evidenced by some writing.¹

§ 30. **Foreign laws not judicially noticed — Mode of proving foreign statutes.**— The validity of a will of personal property being determined according to the law of the domicile of the testator at the time of his death, irrespective of the fact that the property is located within another jurisdiction, it may become necessary to ascertain what the law of the domicile is. If he was living abroad at his death, and it is necessary to inquire into the law of his domicile, courts *will not take judicial notice of the foreign law*, but that law must be proved as any other fact.² This rule is not only applicable to a law of a foreign country, but is also applicable to proof of a law of one state of the American Union when its existence is brought in question in the courts of another state.³ In the absence of proof of the law of the foreign jurisdiction, it will be presumed that the principles of the common law prevail, and the courts of the various states will take notice of the rules and principles of the common law.⁴

But the courts of one state will not take judicial notice of the existence or contents of the statutory law of another state. In most of the states it is now provided by statute that the statutory law of another state may be proved in its courts by reading the same from a book which purports upon its face to

¹ *Emery v. Burbank*, 163 Mass. 326, 39 N. E. R. 1026. See *post*, § 288.

² *Falls v. United States, etc. Co.*, 97 Ala. 417, 13 S. R. 24; *Norris v. Harris*, 15 Cal. 226, 253; *Brackett v. Norton*, 4 Conn. 517, 521; *Brown v. Wright*, 58 Ark. 20, 22 S. W. R. 1022; *Thorn v. Weatherly*, 50 Ark. 237, 7 S. W. R. 33; *Sammis v. Weightman*, 31 Fla. 10, 12 S. R. 526; *McDeed v. McDeed*, 67 Ill. 545; *Lipe v. McClevy*, 41 Ill. App. 59; *In re Capper*, 85 Iowa, 87, 89; *Taylor v. Bank*, 7 Mon. (28 Ky.) 576; *Knapp v. Abell*, 10 Allen (Mass.), 483, 488; *Legg v. Legg*, 8 Mass. 99; *Kline v. Baker*, 99 Mass. 233, 254; *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. R. 209; *Ball v. Con. Franklinite Co.*, 32 N. J. Law, 102, 104; *Uhler v. Semple*, 20 N. J. Eq. 288; *Lincoln*

v. Battelle, 6 Wend. (N. Y.) 675; *Dollfus v. Frosch*, 1 Denio, 367, 374; *Monroe v. Douglas*, 1 N. Y. 452; *Barrows v. Downs*, 9 R. I. 446; *American Oak L. Co. v. Saddle Co.* (Utah), 33 Pac. R. 246; *Territt v. Woodruff*, 19 Vt. 182; *Walsh v. Dart*, 12 Wis. 635; *Talbot v. Seaman*, 1 Cranch (U. S.), 1, 38; *Freemoult v. Dedire*, 1 P. Wms. 429; *Male v. Rogers*, 3 Esp. 163.

³ See cases cited in last note.

⁴ *High's Appeal*, 2 Doug. (Mich.) 515, 529; *Benbow v. Moore*, 114 N. C. 263, 19 S. E. R. 156; *Thorn v. Weatherly*, 50 Ark. 237, 7 S. W. R. 33; *Lipe v. McClevy*, 4 Ill. App. 59; *Sandidge v. Hunt*, 40 La. Ann. 766, 5 S. R. 55; *Dollfus v. Frosch*, 1 Denio (N. Y.), 367, 375.

be printed by or under the authority of the state whose statute is in question.¹ Even in the absence of such a statute it is undoubtedly the better mode of proving the existence and contents of a foreign statute to produce a printed copy of the same, purporting to be the statute in question, duly attested as a true copy by the supreme authority of the foreign government, usually under its seal, or otherwise proved to have been published by or under proper authority, or to have been received as proof of the statute in the courts of the foreign state.

In the absence of all proof of the statute of another state regulating the execution of wills, it will be presumed to be identical in its details with the statutory rules which prevail in the state where the court is sitting.² This statutory mode of proof is exclusive, and parol evidence of a foreign statute

¹ *Haes v. State*, 88 Ala. 87, 7 S. R. 302; *Falls v. United States Sav. Bank*, 79 Ala. 417, 18 S. R. 25; *Lockwood v. Crawford*, 18 Conn. 370, 371; *McDeed v. McDeed*, 67 Ill. 545; *Baltimore, etc. Co. v. Glenn*, 28 Md. 287, 323; *Owen v. Boyle*, 15 Me. 147; *Haven v. Foster*, 9 Pick. 111, 129, 131; *Ely v. James*, 123 Mass. 36, 44; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Alexander v. Pennsylvania Ins. Co.*, 48 Ohio St. 623; *Charlotte v. Chouteau*, 33 Mo. 194; *Ingraham v. Hart*, 11 Ohio, 255, 256; *Leach v. Linde*, 24 N. Y. Supp. 176; *Tenant v. Tenant*, 110 Pa. St. 478, 1 Atl. R. 532; *Territt v. Woodruff*, 19 Vt. 182; *Spaulding v. Vincent*, 24 Vt. 501; *Ennis v. Smith*, 14 How. 400, 426; *Church v. Hubbard*, 2 Cranch, 187, 238; *Pierce v. Indseth*, 106 U. S. 551; *Bremer v. Freeman*, 10 Moo. P. C. 306; *Di Sora v. Phillips*, 10 H. L. Cases, 624; *McCormick v. Garrett*, 5 De G., M. & G. 278.

² *Shepperd v. Nabors*, 6 Ala. 631; *Thorn v. Weatherly*, 50 Ark. 237, 7 S. W. R. 33; *Norris v. Harris*, 15 Cal. 226, 253; *Adams v. Way*, 83 Conn. 432; *Lipe v. McCleavy*, 41 Ill. App. 766; *High's Appeal*, 2 Doug. (Mich.) 515, 529; *Smoot v. Baldwin*, 1 Martin (La., 1811), 523; *Monroe v. Douglas*, 5

N. Y. (1851), 452; *Allen v. Watson*, 3 Hill (S. C.), 819. In the case of *Kline v. Baker*, 99 Mass. 253, on p. 254, the court by Gray, Judge, summarizes the rules governing the proof of foreign law. "The laws of another state are not the laws of this commonwealth, which our citizens are bound to know, or of which our courts have judicial knowledge; but they are facts of which both citizens and courts must be informed as of other facts. When the evidence consists of the parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. But the qualifications of the experts, or other questions of competency of witnesses or evidence, must be passed upon by the court; and when the evidence admitted consists wholly of a written document, statute or judicial opinion, the question of construction is for the court alone. . . . And if the evidence is uncontradicted, and will not support the action, it is the duty of the court so to instruct the jury."

will not be admissible. But parol evidence is all that can be required to prove the common law or an unwritten custom of a foreign country or of another state. An advocate or counselor at law, learned in the laws of the state or foreign country, may state, as an expert, what that law is, in his opinion. It is then for the jury to determine whether the law has been proved, under the instructions of the court as to the character of expert evidence.¹

The disadvantages and unreliability of expert evidence are encountered when it becomes necessary to ascertain the law of a foreign country in which the testator was domiciled at the date of his death by the testimony of an advocate who has studied and practiced law in that country. It may be doubtful if a person who, though he may have a good knowledge of the law, has never practiced in the courts of the foreign country, would be received as an expert.² And it is very obvious that the above method of proving foreign law by expert oral testimony, though commonly employed, is inadequate, and of dubious value as regards the proof of written laws. To permit the contents of a statute to be shown by oral evidence, without at the same time accounting for the absence or non-production of a certified copy, is in direct violation of one of the elementary rules of the law of evidence. But in opposition to this view it is said that the learned witness is not asked to

¹ *Dennison v. Hyde*, 6 Conn. 508; *Brackett v. Norton*, 4 Conn. 517; *Dyer v. Smith*, 12 Conn. 384, 390; *McDeed v. McDeed*, 67 Ill. 545; *Tyler v. Trabue*, 8 B. Mon. (Ky.) 306, 307; *Owen v. Boyle*, 15 Ma. 147, 151; *Baltimore, etc. Co. v. Glenn*, 28 Md. 287, 321; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 225; *Carnegie v. Morrison*, 2 Met. (Mass.) 381, 404; *Haven v. Foster*, 9 Pick. 111, 130; *McRea v. Mattoon*, 13 Pick. (Mass.) 53, 59; *Frith v. Sprague*, 14 Mass. 455; *Kline v. Baker*, 99 Mass. 253; *Bagley v. Francis*, 14 Mass. 453; *Hall v. Costello*, 48 N. H. 54; *Kennard v. Kennard*, 63 N. H. 308; *Livingston v. Insurance Co.*, 6 Wend. (N. Y.) 483; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 482; *Francis v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 403, 429; *Brush v. Wilkins*, 4 Johns. Ch. 520; *Carter v. Wilson*, 1 Dev. & B. (N. C.) 364; *Moore v. Gwynn*, 5 Ired. L. (N. C.) 187, 190; *Ingraham v. Hart*, 11 Ohio, 255, 256; *State v. May*, 7 Oreg. 54; *Amer. L. I. Co. v. Rose-nagle*, 77 Pa. St. 507, 515; *Lattimer v. Eglin*, 2 Dea. Eq. (S. C.) 22; *Barrows v. Downs*, 8 R. I. 446; *Territt v. Woodruff*, 19 Vt. 182; *Robinson v. Clifford*, 2 Wash. C. C. 1, 2; *Consequa v. Williams*, 1 Peters, C. C. 229; *Talbot v. Seaman*, 1 Cranch, 12, 38; *Dickerson v. Matheson*, 50 Fed. R. 78.

² *In re Bonelli* (1875), L. R. 1 P. D. 69, 70; *Bristow v. Sequeville*, L. R. 5 Ex. 275, 19 L. J. Ex. 289; *Harrison v. Harrison*, L. R. 3 Ch. 346.

state orally the contents of the statute, but to give his general opinion as to what the law is, both written and unwritten. He is regarded as an expert, and necessarily all the uncertainty and disadvantages, lack of harmony and bias, which always infect this description of evidence, will detract from the value of his testimony.¹ So, too, the rule requiring a foreign statute law, or the written opinion of a judicial officer of a foreign court, to be proved by the production of a properly authenticated copy, is more consonant with the well-settled rule that the construction of a statute is conclusively for the court, and not to be determined upon evidence addressed to the jury.²

§ 31. **Residence and domicile distinguished.**—In the absence of any evidence to the contrary, the testator will be presumed to have been domiciled in the place where he resided at the date of his death.³ For residence is always some evidence of domicile, though it is not conclusive. A man may have two or more residences widely separated, but he can have but *one* domicile. In order that residence may constitute a domicile, it must be both fixed and established with an intention to remain in the place of residence permanently.⁴

¹ *Baron de Bode v. Reginam*, 10 Jur., pt. 217, 220, 221.

² *Hawes v. State*, 88 Ala. 37; *Norris v. Harris*, 15 Cal. 226, 253; *Brackett v. Norton*, 4 Conn. 517, 521; *McDeed v. McDeed*, 67 Ill. 545; *Owen v. Boyle*, 15 Me. 147; *Baltimore & O. etc. Co. v. Glenn*, 28 Md. 287; *Gardner v. Lewis*, 7 Gill (Md.), 377; *Kline v. Baker*, 99 Mass. 253, 254; *Bowditch v. Soltyk*, 99 Mass. 136; *Haven v. Foster*, 9 Pick. (Mass.) 111, 129; *Palfrey v. Portland, etc. Co.*, 4 Allen, 55; *Ufford v. Spaulding*, 156 Mass. 65; *Kennard v. Kennard*, 63 N. H. 608; *Uhler v. Semple*, 5 N. J. Eq. 288; *Delafield v. Hand*, 3 John. 310; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Smith v. Blagge*, 1 Johns. (N. Y.) 238; *Barrows v. Downs*, 9 R. I. 446; *Insurance Co. v. Wright*, 60 Vt. 522; *Rape v. Rape*, 9 Wis. 328; *Walsh v. Dart*, 12 Wis. 635; *Talbot v. Seaman*, 1 Cranch, 1, 38; *Nelson v. Bridport*, 8 Beav. 527; *Mostyn v. Fabrigas*,

Cowp. 174; *Freemoult v. Dedire*, 1 P. Wms. 429; *Male v. Roberts*, 3 Esp. 163.

³ *Prettyman v. Conaway*, 9 Houst. (Del.) 221, 32 Atl. R. 15; *In re Olsen*, 63 Iowa, 145, 149, 18 N. R. 454; *King v. United States*, 27 Ct. Cl. 529; *High's Appeal*, 2 Doug. (Mich.) 515, 523.

⁴ *Gardner v. Board of Education*, 5 Dak. (1889), 659, 38 N. W. R. 438; *Fain v. Crawford*, 91 Ga. 30, 16 S. E. R. 106; *Tazewell v. Davenport*, 40 Ill. (1866), 197; *Knowlton v. Knowlton*, 155 Ill. (1895), 158, 39 N. E. R. 595; *Cooper v. Beers*, 143 Ill. 25, 33 N. E. R. 61; *Fidelity Tr. Co. v. Preston*, 96 Ky. 277, 28 S. W. R. 658; *North Yarmouth v. West Gardner*, 58 Me. (1870), 207, 213, 214; *Gilman v. Gilman*, 52 id. 165, 175; *Hampden v. Levant*, 59 id. 557, 559; *Harvard College v. Gore*, 5 Pick. (22 Mass.) 370, 374; *Briggs v. Rochester*, 16 Gray (82 Mass.), 837, 340; *Wood v. Roeder*, 45 Neb. 311, 315, 63 N. W. R. 853; *Ayer v. Weeks*, 65 N. H. 248, 249,

A question of domicile often arises where a testator has a residence in the city, where, perhaps, he carries on a business or profession during the winter months, and owns a farm or country residence to which he retires with his family during the heated term. In England it has been held that if a man has a country and a city residence, between which he divides his time, the former shall be regarded by the law as his domicile, unless, being a merchant carrying on a business in the metropolis, or for some other reason, he is, of necessity, to be regarded as domiciled in the city. It would seem more reasonable to assume that if a man, originally from the country, on engaging in business in the city, continues to maintain his country residence while having another residence in the city, that the latter is only temporary, and that he means to retain his domicile of origin in the country. If, on the other hand, his original residence were in town, and he builds a residence in the country as a resort in summer, without connecting himself in other respects with the rural institutions or interests, the presumption would rather be against a change of domicile.¹

"No exact definition can be given of domicile; it depends

18 Atl. Rep. 1108; *In re Hawley*, 1 Daly (N. Y.), 531; *Horne v. Horne*, 9 Ired. (N. C.) Law, 99, 108; *Bell v. Pierce*, 51 N. Y. 12; *In re Zerega's Will*, 12 N. Y. Supp. 497, 58 Hun, 505; *Dean v. Cannon*, 16 S. E. R. 446, 87 W. Va. 123.

¹ *In re Zerega's Will*, 12 N. Y. Supp. 497, 58 Hun, 505; *Gilman v. Gilman*, 52 Me. 165, 176; *Leonard v. Stout*, 36 N. J. L. 370, 374-376. Domicile is "the place where a married man's family reside. But the presumption from this circumstance may be controlled by others, for if it is a place of temporary establishment only for his family, or for transient objects, it will not be deemed his domicile." If his "family is fixed in one place, and he does business in another, the former is considered the place of his domicile." Story, *Conf. Laws*, § 46; *Nugent v. Bates*, 50 N. W. R. 76, 51 Iowa, 77. "There is a wide difference between domicile and mere resi-

dence. . . . Domicile is the established, fixed, permanent, and may therefore be said to be the ordinary, dwelling place or residence of a party, as distinguished from his temporary and transient, though actual, place of residence. One is his legal residence as distinguished from his temporary place of abode; or, to use the language of the charge, one is his home, as distinguished from the place or places to which business or pleasure may temporarily call him." *Salem v. Lyme*, 29 Conn. 74, on p. 79. "A residence at a particular place, accompanied with positive or presumptive proof of continuing there for an unlimited time," is a personal domicile. Story, *Conf. Laws*, § 43. "Habitat in a place with the intention of remaining there forever, unless some circumstance should occur to alter the intention." *Whicker v. Hume*, 7 H. L. Cases, 164.

on no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case."¹ A person's domicile is where that person lives or has his home, *i. e.*, where he has his true, fixed, permanent abode and principal domestic establishment, and to which, whenever he is absent, he has an intention to return.²

§ 32. **The presumption of a continuance of domicile—A change of residence and an intention must coincide.**—A domicile proved to exist will be presumed to be retained until a new domicile is acquired. A man's residence is *prima facie* his domicile. But the presumption arising from residence is rebutted by very slight circumstances. The question of a man's domicile is always one of fact, depending upon all the circumstances of the case together with the intention of the person whose domicile is in question. A change of residence is material evidence of a change of domicile, but it is never conclusive. The change of residence, in order to constitute a change of domicile, must be accompanied by an intention to remain permanently and indefinitely in the new place of residence. The person must intend to make the new residence his home. The facts from which the *existence of* a domicile may be inferred are not enough alone to constitute a *change* of domicile unless the intention to acquire a new domicile is also present. The intention and the facts must co-exist.³

¹Thorndyke v. Boston, 1 Metc. (42 Mass.) 245; 488; Warren v. Thomaston, 43 Me. 406.

²Story, Conf. Laws, § 41. Vattel defines domicile as "the habitation fixed in any place with an intention of always staying there;" and this is quoted with approval in Gilman v. Gilman, 52 Me. 165, 173; Thompson's Case, 1 Wend. (N. Y., 1828), 43; and Roberts' Case, 8 Paige (N. Y., 1840), 519. In Jennison v. Hapgood, 10 Pick. (Mass.) 77, domicile is said to be a residence at a place accompanied by an intention to remain there permanently, or at least for an indefinite time. Or a "habitation fixed in any place without any present intention of removing therefrom." Putnam v. Johnson, 10 Mass.

³Allgood v. Williams, 92 Ala. 551, 8 S. R. 722; City of Hartford v. Champion, 58 Conn. 268, 20 Atl. R. 471; People v. Connell (1888), 28 Ill. App. 285; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. R. 704; Steer's Succession, 47 La. Ann. 1551, 18 S. R. 503; McKowen v. McGuire, 15 La. Ann. 637; Hart v. Horn, 4 Kan. (1867), 232, 239; Hallowell v. Saco, 5 Me. (1827), 43; Wayne v. Greene, 21 Me. (1842), 537; Turner v. Buckfield, 3 Me. (1825), 239; Gilman v. Gilman, 53 Me. 165, 177; Hallet v. Bassett, 100 Mass. 170; Thorndike v. Boston, 1 Metc. (Mass.) 245; Sears v. Boston, 1 id. 251; Kilburn v. Bennett, 3 id. 199; Jennison

§ 33. **The effect of residence abroad in governmental employ.**—Service as an official in foreign parts, whether in the military or naval service, as of a physician in the navy,¹ or an officer in the British army in India,² or as a judge or other official in the service of the civil department of the government,³ does not work a change of domicile. And the acceptance of an office abroad, to be held at the pleasure of the crown, does not effect a change of domicile even when the officer, on going abroad, was accompanied by his family. A consul or an ambassador does not necessarily acquire a domicile in the country to which he is accredited,⁴ though he may do so if he remain there permanently with the intent to make it his home after he has ceased to represent his native land.⁵ So one who, dur-

v. Hapgood, 10 Pick. (Mass.) 77; Harvard v. Gore, 5 Pick. (Mass.) 370, 374; High's Appeal, 2 Doug. (Mich.) 515, 523; Mayo v. Equitable L. I. Co., 71 Miss. 590, 15 S. R. 791; Ayer v. Weeks, 65 N. H. 248, 249, 18 Atl. R. 1108; State v. Palmer, 65 N. H. 9, 10, 17 Atl. R. 977; Leach v. Pillsbury, 15 N. H. 137; Isham v. Gibbons, 1 Bradf. 69; In re Gould's Will, 56 Hun, 643, 9 N. Y. Supp. 603; Graham v. Public Administrator, 4 Bradf. (N. Y.) 127; Boardman v. House, 18 Wend. (N. Y.) 512; Frost v. Brisbin, 19 id. 11; Hegeman v. Fox, 31 Barb. (N. Y.) 475; Berry v. Hull (N. Mex., 1893), 30 Pac. R. 936; Horne v. Horne, 9 Ired. (N. C.) Law, 99, 107; Plummer v. Brander, 5 Ired. Eq. (N. C.) 190; Reed's Case, 7 Pa. St. 378; In re Lowry's Estate, 18 Pa. Co. Ct. R. 591; Price v. Price, 156 Pa. St. 617, 33 W. N. C. 51, 27 Atl. R. 291; Gravely v. Gravely, 25 S. C. 1; Munroe v. Williams, 37 S. C. 81; Faires v. Young, 69 Tex. 482; Benavides v. Guassett (Tex.), 28 S. W. R. 113, 6 S. W. R. 800; McIntyre v. Chappell, 4 Tex. 197; Foster v. Hall, 4 Humph. (Tenn.) 346, 348; Williams v. Saunders, 5 Coldw. (45 Tenn.) 60, 80; Lane v. Pardee, 2 Swan (32 Tenn.), 232; White v. White, 3 Head (40 Tenn.), 404; Lindsay v. Murphy, 76 Va. 430; Fulham v. Howe, 62 Vt. 386, 20 Atl. R. 101;

White v. Tennant, 31 W. Va. 790, 8 S. E. R. 596; Andrews v. Mundy, 14 S. E. R. 414, 36 W. Va. 22; McDonald v. Salem Mills, 31 Fed. R. 577; Mitchell v. United States, 21 Wall. (88 U. S.) 350, 353; Desmore v. United States, 93 U. S. 603, 609; Wright v. Schneider, 32 Fed. R. 705; Hurley v. Hurley, 61 Law T. (N. S.) 384; Douglas v. Douglas, L. R. 12 Eq. 617; Dalhousie v. M'Doual, 7 Cl. & Fin. 817; Brown v. Smith, 15 Beav. 444. In the case of Craigie v. Lewin, 3 Curt. 435, it is said by the court: "There must be both *animus* and *factum*—that is the result of all the cases. This case must depend upon its own circumstances; the principle upon which it is to be determined is the same in all cases, and that principle, extracted from all the cases, is this: that a domicile once acquired remains until another is acquired or that first one abandoned."

¹ Brown v. Smith, 15 Beav. 444, 448; In re Fatten, 6 Jur. (N. S.) 151.

² Bruce v. Bruce, 2 Bos. & Pul. 229, 231.

³ Attorney-General v. Pottinger, 6 H. N. 733; Attorney-General v. Rowell, 1 Hurl. & Colt. 31, 43.

⁴ Sharpe v. Crispin, L. R. 1 P. & D. 611.

⁵ Heath v. Sampson, 14 Beav. 441,

ing the French revolution, fled for safety to England, remaining there many years, but subsequently returned to France, where he died, was held not to have acquired any domicile in England.¹

§ 34. Effect of a change of residence for the sake of health.

A person who leaves his native country and goes abroad for the benefit of his health, intending, if his health is restored, to return, but who, not experiencing any permanent improvement and acting under the urgent advice of physicians, warning him of the danger of a sea voyage, fails to return to his domicile of origin, and ultimately dies abroad, does not lose his original domicile or acquire a new one.² So, too, residence as a student at a college, or other educational institution, is of very slight value as evidence of domicile, particularly when the student retains his family connections, visits the home of his parents, and spends his vacations there.³

§ 35. The domicile of married women and minors.—A woman by her marriage loses her domicile of origin and acquires that of her husband. While the husband and wife are living together, her domicile is his.⁴ But a wife after her abandonment by her husband,⁵ or after an absolute divorce or a judicial separation,⁶ may acquire and retain a domicile separate and distinct from that of her husband. And where a wife had, *with the consent of her husband*, lived apart from him for years,

445; *Attorney-General v. Kent*, 1 Hurl. & Colt. 12.

¹ *De Bonneval v. De Bonneval*, 1 Curt. 656, 866.

² *Dupuy v. Wurtz*, 53 N. Y. (1873), 556, 564-574; *Still v. Woodville*, 38 Miss. (1859), 646, 651; *Haskins v. Matthews*, 8 D. M. & G. 13, 26-32.

³ *Granby v. Amherst*, 7 Mass. (1810), 1, 4; but *cf.* *Putnam v. Johnson*, 10 Mass. 488, 493, where the student was held to have established a domicile by attendance at college.

⁴ *Glover v. Glover*, 18 Ala. 367; *Harrison v. Harrison*, 20 Ala. 629, 643; *Dow v. Gould*, 31 Cal. 629; *Wingfield v. Rea*, 77 Ga. 84, 86; *Davis v. Davis*, 30 Ill. 180, 184; *Barrett v. Palmer*, 8 Ind. App. 356, 35 N. E. R. 713; *Mo-Afee v. University*, 7 Bush (70 Ky.,

1868), 135, 136; *McGuire v. McGuire*, 7 Dana (37 Ky., 1838), 181; *Barbour v. Root*, 10 Mass. 265; *Green v. Green*, 11 Pick. (28 Mass.) 410, 415; *Harteau v. Harteau*, 14 id. 181; *Hackettstown v. Mitchell*, 28 N. J. L. 516, 518; *Ames v. Duryea*, 61 N. Y. 609; *Dorsey v. Dorsey*, 7 Watts (Pa., 1838), 350; *Williams v. Saunders*, 5 Coldw. (42 Tenn.) 60, 79; *Smith v. Sun Printing Co.*, 55 Fed. R. 240; *Dalhousie v. M'Doual*, 7 Cl. & Fin. 817.

⁵ *Shute v. Sargent* (N. H.), 36 Atl. R. 282; *Irby v. Wilson*, 1 D. & B. (N. C.) Eq. 568, 582.

⁶ *Barber v. Barber*, 21 How. (62 U. S., 1858), 522; *Cheever v. Wilson*, 9 Wall. (76 U. S., 1869), 124; *Cheeley v. Clayton*, 110 U. S. 705; *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. R. 806.

he contributing nothing to her support, but living in another state, it was held that his rights in her property on her death would be governed by the law of her domicile, which was the state in which she resided.¹

The domicile of the father of a legitimate minor, or of the mother or guardian of an illegitimate one, is the domicile of the minor. The minor not being *sui juris* cannot himself effect a change of domicile.² A change of domicile by the father or guardian accompanied by the minor will constitute a change in the latter's domicile.³ The domicile of the father after his death remains the domicile of the minor until the latter's domicile is changed by his mother.⁴ And as the change of the domicile of a minor which may result from a change of the domicile of his *widowed* mother is to be looked upon as the exercise of a power vested in the mother for the benefit of the minor, it follows that a change in her domicile, *resulting from her remarriage*, does not effect a change in the minor's domicile.⁵ If she acquire a new domicile by a remarriage, her power to change the minor's domicile subsequently no longer exists.⁶ A testamentary guardian has power to change the domicile of the ward where he has the custody of the ward's person.⁷ But the law will not countenance an attempt by the guardian to change the minor's domicile where the change is made solely for the purpose of defrauding him.⁸

§ 36. The declarations of the testator as evidence of domicile.—A man's declarations accompanying a change of residence as to his reasons for the change, or made during residence

¹ *In re Florence's Will*, 54 Hun. 328, 7 N. Y. Supp. 578.

² *High's Appeal*, 2 Doug. (Mich.) 515, 524; *Trumbo v. Richardson* (Ky.), 88 S. W. R. 700; *In re Daly's Settlement*, 25 Beav. 456; *Yelverton v. Yelverton*, 29 L. J. Matr. 34.

³ *Marks v. Marks*, 75 Fed. R. 821; *Ludlam v. Ludlam*, 26 N. Y. 356, 371; *Guier v. O'Donnell*, 1 Binn. (Pa., 1808), 349, 352; *In re Canne's Estate*, 15 Pa. Co. Ct. R. 312; *Wheeler v. Hollis*, 19 Tex. 522, 527; *Craignish v. Hewitt*, (1892), 3 Ch. 190.

⁴ *Trammell v. Trammell*, 20 Tex. 406, 417.

⁵ *In re Beaumont*, 8 Reports, Feb. 64; (1893), 3 Ch. 490.

⁶ *Brown v. Lynch*, 2 Bradf. (N. Y.) 214; *Allen v. Thomason*, 11 Humph. (Tenn.) 536, 538; *Mears v. Sinclair*, 1 W. Va. 185, 195.

⁷ *Mill's Guardian v. City of Hopkinson* (Ky.), 11 S. W. R. 776.

⁸ *Trammell v. Trammell*, 20 Tex. 406, 417; *Wheeler v. Hollis*, 19 id. 522, 527; *Upton v. Northbridge*, 15 Mass. 239; *School Directors v. James*, 2 Watts & S. (Pa., 1841), 568, 572; *Pottinger v. Wightman*, 3 Mer. 67.

in a particular place as to his intention to remain there permanently, are admissible to show that he intended that his place of residence should be regarded as his domicile. His declarations are never conclusive.¹ The fact that the testator describes himself in his will as of a particular city and state is not controlling.² And the declaration of the testator, to be received as proof of domicile, must not be too remote, and must have been made when he had no interest to misrepresent.³ The fact that the testator voted⁴ and paid taxes⁵ and served upon a jury in a particular place, and his statements in doing so, are always relevant.⁶

¹ *Gilman v. Gilman*, 52 Me. 165, 177; *Chase v. Chase*, 66 N. H. 588, 592, 29 Atl. R. 553; *Viles v. City of Waltham*, 157 Mass. 542, 82 N. E. R. 901; *In re Zerega's Will*, 20 N. Y. Supp. 417.

³ *Ayer v. Weeks*, 65 N. H. 248, 18 Atl. R. 1108.

⁴ *Hewes v. Baxter*, 48 La. Ann. 1303.

⁵ *Chase v. Chase*, 66 N. H. 588, 592; *In re Zerega's Will*, 20 N. Y. Supp. 417.

² *Gilman v. Gilman*, 52 Me. 165, 177; *Mackenzie v. Mackenzie*, 23 N. Y. Supp. 270, 3 Misc. R. 200; *Gable v. Mays (Md.)*, 17 Atl. R. 565.

⁶ *Fulham v. Howe*, 60 Vt. 351, 14 Atl. R. 652; *Chambers v. Prince*, 75 Fed. R. 176; *Mackenzie v. Mackenzie*, 23 N. Y. Supp. 270, 3 Misc. R. 200.

CHAPTER III.

WHAT WRITINGS ARE TESTAMENTARY.

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| <p>§ 37. No particular form required for a will—An instrument conveying a present interest is not testamentary.</p> <p>38. The intention of the maker of the instrument.</p> <p>39. Parol evidence to show the character of the instrument.</p> <p>40. Writings partly contractual and partly testamentary.</p> | <p>§ 41. Memoranda of instructions for the preparation and execution of wills.</p> <p>42. Wills in the form of letters.</p> <p>43. Promissory notes and similar writings.</p> <p>44. The delivery and registration of the instrument as evidence that it is a deed.</p> <p>45. A writing that is invalid as a will may be valid as a deed.</p> |
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§ 37. No particular form required for a will—An instrument conveying a present interest is not testamentary.—It is never necessary, in order that a writing operate as a will, that it shall assume a particular form, or that any particular language, technical or otherwise, shall be employed, if the writing is properly executed according to the requirements of the statute. Very informal and fragmentary writings have been admitted to probate. The inquiry at the probate is not as to the formal regularity of the writing, but what was the intention of the person who wrote it? The court must seek to ascertain the standpoint from which the writer viewed the document to which he has appended his signature, and if he *intended it to operate as a will* the court will determine that such is its character, though he may have ignorantly called it a deed. If the intention of the party is reasonably clear, the court will consider the instrument a will, and void if it is not properly executed; or revocable if it is properly executed, though all parties may have called it a deed, and though it may have been executed as a deed.

The courts, in determining whether an instrument disposing of real estate is a deed or a will, are guided by the following considerations: If the instrument, whatever its form or the mode of its execution, *passes a present interest which vests from*

the time of its execution, it will be a deed, though the possession and the enjoyment of the estate granted in it do not accrue to the grantee until a future time. On the other hand, if the instrument, though it is in form a deed, *does not convey any vested interest, right or estate until the death of the person executing it*, it will be regarded as testamentary and revocable.

The employment of language appropriate to either instrument is never controlling.¹ Nor is the belief of the maker or an understanding between the parties interested that the instrument is a will or a deed conclusive upon the court (except when made so by statute), though evidence as to the belief of the parties as to its operation and effect is relevant to show their understanding as to the intention in executing it. The court must take into consideration the language of the instrument, and the circumstances surrounding the parties and attendant upon its execution; and if, from all the evidence, it appears to have been the intention of the maker that the instrument shall have a *post-mortem* effect only, it will be held to be a testament, and not a deed.²

¹ *Parker v. Stephens* (Tex. Civ. App.), 39 S. W. R. 164.

² *Messer v. Messer's Ex'r*, 32 Ala. (1858), 551, 556; *Gillhan v. Mustin*, 43 Ala. 365, 367; *Walker v. Jones*, 23 Ala. 448, 456; *Kelly v. Richardson*, 100 Ala. 584, 13 S. Rep. 785; *Sharp v. Hall*, 86 Ala. 110; *Crocker v. Smith*, 94 Ala. 295, 10 S. R. 258; *Clarke v. Ransom*, 50 Cal. 595, 600; *Stewart v. Stewart*, 5 Conn. 317; *Goff v. Davenport*, 23 S. E. R. 395, 96 Ga. 423, 425; *Hall v. Bragg*, 23 Ga. 330; *Symmes v. Arnold*, 10 Ga. (1851), 508, 509; *Comer v. Comer*, 120 Ill. 420, 11 N. E. R. 864; *Stroup v. Stroup*, 140 Ind. 179; *Robinson v. Brewster*, 140 Ill. 649, 80 N. E. R. 683; *Burlington v. Barrett*, 22 Iowa, 60; *In re Longer* (Iowa, 1899), 78 N. W. R. 834; *Hazleton v. Reed*, 46 Kan. 73, 77, 37 Kan. 321; *Lacy v. Comstock*, 55 Kan. 86, 88; *Maxwell v. Maxwell*, 3 Metc. (Ky.) 100; *Carey v. Dennis*, 13 Md. 1, 19; *Boyd v. Boyd*, 6 Gill & J. (Md.) 25; *Bromley v. Mitchell*, 155 Mass. 509, 80 N. E. R. 83; *Lautenschlager's*

Estate, 80 Mich. 285 (1890), 45 N. W. R. 147; *McGrath v. Reynolds*, 116 Mass. 566; *Conrad v. Douglas* (Minn., 1897), 61 N. W. R. 753; *Herrington v. Bradford* (1832), 1 Miss. 520; *Robnett v. Ashlock*, 49 Me. 172; *Gage v. Gage*, 12 N. H. 371, 377; *Outlaw v. Hurdle*, 1 Jones (46 N. C., 1854) Law, 157; *Wheeler v. Durant*, 3 Rich. Eq. (S. C.) 452, 464; *Lyles v. Lyles*, 2 Nott & McC. (N. C., 1820), 531; *Frew v. Clarke*, 80 Pa. St. 170; *Patterson v. English*, 71 Pa. St. 458; *Turner v. Scott*, 51 Pa. St. 126; *Pritchett's Estate*, 9 Pa. Co. Ct. Rep. 600; *Carpenter v. Hannig*, (Tex. Civ. App., 1896) 34 S. W. R. 774; *Chrisman v. Wyatt*, 7 Tex. Civ. App. 40, 26 S. W. R. 759; *Wren v. Coffey* (Tex.), 26 S. W. R. 142; *Lauck v. Lauck* (W. Va., 1898), 31 S. E. R. 686; *Roberts v. Coleman*, 37 W. Va. 143, 161; *Leaver v. Gauss*, 17 N. W. R. 522; *Ogle's Estate* (Wis., 1898), 73 N. W. R. 389; *Bowdoin College v. Merritt*, 75 Fed. R. 480; *In re Slinn's Goods*, 15 Prob. Div. 156; *Habergham v. Vincent*, 2

§ 38. The intention of the maker of the instrument.—The intention present in the mind of the maker of the instrument is always material; and while his belief that the paper will have a testamentary effect is never conclusive, his intention that no present title shall vest in the party to whom the instrument transfers property has very great weight and may determine the character of the paper.¹ To ascertain the intention it is allowable to receive evidence of all the circumstances surrounding the execution as well as evidence of the language of the parties. It may be shown that in making the instrument the maker *did not dispose of all his property*. So the relations of the parties, the fact that the maker of the instrument was without any near relatives; that he had expressly instructed an attorney to draw a will, and that he did not deliver the writing as he would have done if it were a deed, but retained it and placed it among papers which were not to be opened during his life-time, are all relevant to show that the writing is a will and not a deed.² So a clause in the instrument stating that it is executed to avoid the necessity and expense of administering on the decedent's estate may be considered in determining whether its effect is to be testamentary.³

§ 39. Parol evidence to show the character of the instrument.—In seeking the intention of the maker of an instrument, the court must, in the first instance, consult the language

Ves. Jr. 204, 4 Bro. C. C. 355; Green v. Proude, 3 Keb. 310, 1 Mod. 117. "In determining whether an instrument be a deed or a will the main question is, Did the maker intend to convey any estate or *interest* whatever to vest before his death, and upon the execution of the paper? Or, on the other hand, did he intend that all the interest and estate should take effect only after his death? If the latter, it is a will; and it is immaterial whether he calls it a will or a deed, the instrument will have operation according to its legal effect." Wall v. Wall, 30 Miss. (1856), 91. See also Worley v. Daniel, 90 Ga. 650, 16 S. E. R. 938. If the object of the instrument is to vest a title only on the death of the grantor, it is by no means material

that possession is taken at once. Bowler v. Bowler, 176 Ill. 541, 52 N. E. R. 437.

¹Turner v. Scott, 51 Pa. St. 126; Greenpoint S. Co. v. Whitin, 69 N. Y. 328, 336.

²Sharp v. Hall, 86 Ala. 110, 5 S. R. 497; In re Lautenschlager, 80 Mich. 285, 45 N. W. R. 147.

³Sharp v. Hall, 86 Ala. 11, 5 S. R. 497. In determining whether an instrument is a deed or a will, its language, the name attached to it, or the belief of its maker as to its character, do not of themselves control, but will all be weighed with the other circumstances to ascertain the intention of the maker. Lauck v. Lauck (W. Va., 1893), 31 S. E. R. 936.

of the writing itself. The fact that the writing which is presented for probate is testamentary in form is some evidence that it is a will.¹ The form of the instrument is not controlling. The court of probate may go outside of the writing to ascertain its character; *not to supply an intention which cannot be found in it*, but to ascertain with what intention the execution of the instrument was accompanied. The declarations of the testator, whether made before, at, or subsequent to execution, may be received to show whether he did or did not regard it as a will.²

And it is very important to ascertain, not only how the instrument was regarded by the testator at the date of its execution, but how it was regarded by those who now claim under it as a will; for, if it shall appear that they have, at its execution and during the life-time of the testator, acted with the understanding that it is a deed or other contract, they will, particularly if the rights of third persons have been prejudiced by their acquiescence or conduct, be estopped from claiming that it is testamentary. In order to ascertain this, the court is entitled to a full disclosure (which can be had only by parol evidence) of all the circumstances of the case, including the family relations of the testator, the situation and condition of his property, the relations in which he stood to the proponent of the will, and full particulars as to his age, intelligence and mental condition at the time the writing was executed.³

§ 40. Writings partly contractual and partly testamentary.—A writing may be, at the same time, a contract and a

¹ *Moye v. Kittrell*, 29 Ga. 677, 680.

² *Witherspoon v. Witherspoon*, 2 McCord (S. C., 1823), 520; *Waller v. Waller*, 1 Gratt. (Va.) 454; *Wheeler v. Durant*, 3 Rich. Eq. (S. C., 1851), 452, 456. His statement, made at the date of execution, that the writing is his will, is strong evidence of its character. *Robinson v. Brewster*, 140 Ill. 649, 30 N. E. R. 1, 83; *Scott's Appeal*, 147 Pa. St. 89, 29 W. N. C. 176, 23 Atl. R. 212.

³ *Wareham v. Sellers*, 9 Gill & J. (Md., 1837), 98; *Robey v. Hannon*, 6 Gill (Md., 1851), 463, 477; *Robertson v. Dunn*, 2 Murph. (N. C.) 133; *Chi-*

chester v. Quatrafagus, (1895) Prob. 186, 11 Reports, 605; *Clark v. Ransom*, 50 Cal. 595; *Ehrenberg's Succession*, 21 La. Ann. 280; *Barker v. Comins*, 110 Mass. 477, 488; *Osborn v. Cook*, 11 Cush. 532, 535; *In re English*, 3 Sw. & Tr. 586, 34 L. J. Prob. 5; *Robertson v. Smith*, L. R. 2 Prob. 43, 23 Law T. (N. S.) 417. It may also be shown by parol that a writing, apparently a will, was not intended to be taken as an independent testamentary instrument, but as a duplicate of an existing will. *Hubbard v. Alexander*, L. R. 3 Ch. Div. 738.

will. It may contain a contract disposing of one piece of property and a will disposing of another. The invalidity of either the contract or the will does not affect the validity of the other, and the will, if properly executed, ought to be admitted to probate, though the contract is void.¹

So, in England where a man, by an instrument in the form of a power of attorney, empowered a person to receive the rents of certain of his property for her support, and in the event of the death of the principal the land was, by the terms of the instrument, to "be assigned and delivered to the attorney," it was held that so much of the instrument as was testamentary in its character could be probated, though the rest of the instrument was valid only as a contract.²

Sometimes it is doubtful whether a writing is a contract or a will. The determination of this question is all-important, for if the writing is a contract it is enforceable against the estate of the deceased contracting party, though it may not have been executed with the proper formalities for probate as a will.³ Thus, where two persons entered into partnership under a contract by the terms of which all the property of the senior partner was, in the event of his death, to go to the junior, it was held that, though the writing could not be probated as a will, it was a valid contract and was entitled to specific performance in equity at the suit of the survivor.⁴

On the other hand, if the writing is intended to operate both as a will and as a contract, that part of it which is wholly testamentary cannot be regarded as entitled to specific performance in a court of equity. Thus, where the owner of cattle and land hired the cattle to another, who agreed to live with and care for him, the other retaining full possession of the land, it was held that a clause in the contract by which, on the owner's death, "the right and interest of the land were to vest in the other party," was testamentary, and that the plaintiff was *not, for that reason*, entitled to its specific performance.⁵

The importance of determining whether the instrument in

¹ Reed v. Hazleton, 37 Kan. 821, 15 Pac. R. 177.

⁴ McKinnon v. McKinnon, 56 Fed. R. 409, 5 C. C. A. 530, reversing 46

² Doe d. Cross v. Cross, 8 Q. B. 714; Fed. R. 713.

In re Robinson, L. R. 1 P. & D. 384; Patch v. Shore, 2 Dr. & Sm. 589.

⁵ Hazleton v. Reed, 46 Kan. 63, 26 Pac. R. 450.

³ See § 41.

question is a will or a deed arises from the rule permitting *wills to be revoked at any time* after execution. A deed conveying real property is irrevocable after delivery to the grantee. Hence if the instrument in question is a deed of conveyance designed to convey a present vested interest, though possession may have been postponed, it cannot be defeated by a deed or a will subsequently made which disposes of the property in another and inconsistent manner. But if the writing is a will, it may be revoked by the testator at any time, either by a conveyance *inter vivos* or an inconsistent testamentary disposition of the same property.¹

§ 41. Memoranda of instructions for the execution and preparation of wills.—A memorandum containing advice as to the disposition of the estate of the writer, but making no actual disposition of it, cannot be a will. Hence, the general rule is that a mere writing containing no complete plan for the disposition of the property of the deceased, but indicating on its face that it was to be superseded by a will subsequently drawn, is not a valid will.² Thus, a memorandum on the fly leaf of a book as follows: “\$5,000 for West. Md. College. \$1,000 of it to be given to the Theological Seminary; \$1,000 to Ward Hall. The \$3,000 to be given to the main college,” has been held invalid as a will, for the reason that it was clearly evident that the writer had no *present intention* to give such property, not having signed or executed it according to the statute.³

The fact that the person executing the writing declares in it that it is not to be regarded as a formal will is not controlling, and the paper, if properly executed as a will, should be admitted to probate.⁴ But, on the other hand, where, after a

¹ *Swann's Executor v. Houseman*, 90 Va. 916, 817 (1893), 20 S. E. R. 830; *Perry v. Perry*, 66 Hun, 629, 21 N. Y. Supp. 133; *Woods' Estate*, 36 Cal. 75 (1869); *Atwood v. Geiger*, 69 Ga. 398 (1883).

² *In re Barber's Will*, 37 N. Y. Supp. 235, 92 Hun, 489.

³ *Trustees of Western Maryland College v. McKinstry*, 75 Md. 183, 23 Atl. R. 471. So, too, a paper which neither appoints executors nor makes

any disposition of the property of the deceased has been held not testamentary, though in form a will, and purporting to be such. *Coffman v. Coffman*, 85 Va. 459, 8 S. E. R. 672.

⁴ Thus, where the decedent stated “that this writing is instead of a formal will which I intend to make,” and afterwards signed it, and it was attested by two witnesses, it was admitted to probate. *In re Beebe*, 6 Dem. Sur. 43.

woman had executed an instrument in a mode to qualify it for probate, but had placed at the head the words, "This is not meant as a legal will, but as a guide," probate was refused upon the grounds that she did not intend to make a will at that time.¹

§ 42. **Wills in the form of letters.**—It is well settled that letters couched in very informal language may be admitted to probate as holographic wills, provided they have the requisite characteristics of such instruments.² Thus, a letter written by a person about to set off on a sea voyage, instructing the person to whom it was addressed in what manner the writer desired his property to be disposed of in the event of his not returning, has been admitted to probate as a will. The language of the letter was as follows: "A thousand accidents may occur to me which might deprive my sisters of that protection which it would be my study to afford; and in that event I must beg that you will attend to putting them in possession of two-thirds of what I may be worth, appropriating one-third to Miss C. and her child, in any manner that may appear most proper."³ So a letter in these words: "Mrs. S. L. is to be my heiress. G. Ehrenberg;"⁴ or, "Dear Old Nance: I wish to give you my watch, two shawls, and also \$5,000. Your old friend, E. A. Gordon,"⁵ has been probated.⁶ A letter, "I wish my sister to have my bank book," etc., was held a will, where the writer was seriously ill at the time she wrote it. The court relied on the fact that she did not give the book to the sister at this time, as she might easily have done, as a circumstance showing strongly that the writing was to take effect at the death of the writer, and that hence it was of a testamentary character.⁷

¹ *Ferguson-Davie v. Ferguson-Davie*, 15 Prob. Div. 109.

² See *ante*, § 9; *Tozer v. Jackson*, 164 Pa. St. 373, 30 Atl. R. 400, 35 W. N. C. 264; *Boyd v. Boyd*, 6 Gill & J. (Md.) 25; *High's Appeal*, 2 Doug. (Mich.) 515, 521.

³ *Morrell v. Dickey*, 1 Johns. Ch. (N. Y., 1814), 153, 156; and *Grattan v. Appleton*, 3 Story C. C. (1845), 755, 765, is to the same effect.

⁴ *Ehrenberg's Succession*, 21 La. Ann. 280.

⁵ *Clarke v. Ransom*, 50 Cal. 595.

⁶ See also *Drybutter v. Hodges*, 2 Hag. 247; *Passmore v. Passmore*, 1 Phil. 218; *In re Mundy*, 7 Jur. (N. S.) 52, 30 L. J. Prob. 85.

⁷ *Cook v. Cook*, L. R. 1 P. & D. 241. A sealed envelope indorsed with these words: "Dear Bella: This is for you to open;" and in which was

§ 43. **Promissory notes and similar writings.**— Instruments in the form of promissory notes are often executed with an intention that they shall have a testamentary effect, though in the majority of instances the intention is defeated because they do not in their form comply with the requirements of the statute regulating the execution of wills. Thus, an instrument which directed the executor of the maker to pay a person mentioned therein the sum of \$3,000, signed, sealed, and attested by one witness, was held void and inoperative as a will, because of the statutory requirement that all bequests of personal estate should be attested by two witnesses.¹ An instrument called a bond, and having some of the attributes as such an obligation, agreeing to pay a sum of money upon the death of the subscriber as a gift, has been held testamentary and revocable during the life of the obligor, though delivered.² So, too, an instrument called a bond, in which the obligor, the father of the obligee, agrees with the latter that, if he shall not convey the land to a third person during his life, it shall vest in the obligee on his death, he reserving to himself full power to convey during his life-time; and which concludes by

a promissory note with a letter: "My wish is for you to draw this \$3,000 for your use should I die sudden," and signed E. F., was held a will. *Fesselmann v. Elder*, 96 Pa. St. (1881), 159. "This article is to signify if A. survive me I bequeath him \$1,000 of my property free from any lien or incumbrance. To the above bequest I hereunto set my hand and seal this 1st day of June, 1888. A. B." This was held a will. *Swann's Ex'r v. Hausman*, 90 Va. 816, 817. An instrument in the following form was recently admitted to probate as a will: "This is to serify that ie levet to mey wife Real and persnal and she to dispose for them as she wis." *Mitchell v. Donohue*, 100 Cal. 202, 84 Pac. R. 614.

¹ *Cover v. Stem*, 67 Md. 449, 10 Atl. R. 281. So, also, a promissory note payable on demand, with a parol agreement that it is not to be paid

until the death of the testator, is not a will, but is valid as a promissory note, and evidence to show lack of consideration is inadmissible. *Woodbridge v. Spooner*, 3 B. & A. 233. See, however, *Johnson v. Jackson's Adm'r*, 6 Dana (36 Ky.), 257. Judgment notes payable one day after date, which were executed while a will was in existence, will not be regarded as testamentary papers, merely because the evidence shows that they were not to be delivered to the payee until the death of the maker; or because the maker stated that he "made out papers so that all his personal property on his death should go to" those whose names were inserted in the notes. In *re Sunday's Estate*, 81 Atl. R. 353, 167 Pa. St. 30. And cf. *O'Neil's Estate* (Minn., 1898), 76 N. W. R. 27.

² *Johnson v. Yancey*, 20 Ga. (1856), 707.

directing a conveyance of the land to the obligee by the executor of the obligor, is testamentary, and, not being executed with the formalities required by the statute, is void.¹ A writing signed by sisters as follows: "Know all men by these presents, that we, J. E. S. of the one part, and P. T. S. of the other part, have covenanted and agreed, and do covenant and agree, that whichever of us may be longest lived shall be the heir of the other," is a will.² Though such an instrument may be invalid as a will, it may be sufficient to bind the estate of the maker as a contract or obligation to pay the amount named in it, in the absence of fraud in its procurement or lack of consideration. Thus, a writing in the form of a promissory note, under seal and witnessed, binding the estate of the maker to pay a certain sum of money stated therein six months after his death, is sufficient to sustain an action of debt in a court of common law.³ The holder of such an instrument is a creditor of the estate and must pursue his remedy at law against the personal representative. In case of a deficiency of assets he is entitled only to the payment of his claim *pro rata* with the other unsecured creditors, and any judgment he may obtain will abate ratably to make up the deficiency.⁴

§ 44. The delivery and registration of the instrument as evidence that it is a deed.—The facts that an instrument is acknowledged as a deed, that it is sealed⁵ and has been delivered to a grantee who is named therein, and that it has by him been recorded as a deed,⁶ are not conclusive as to its non-testamentary character, where it appears from the writing itself that the title to the property mentioned in it is not to vest until the death of the grantor, and it also appears by parol evidence that the parties intended it to be a will.⁷ But these facts are of considerable value in determining whether an instrument which is in form a deed was intended by the person who executed it to operate during his life or at his death. A deed has no validity

¹ *Roberts v. Coleman*, 16 S. E. R. 482, 37 W. Va. 143, 151.

² *Evans v. Smith*, 28 Ga. (1859), 98. As to mutual wills, see *ante*, § 11.

³ *Kirkpatrick v. Pyle*, 9 Houst. (Del.) 569.

⁴ *In re Holt's Estate*, 23 Pittsb. Leg. J. (N. S.) 335.

⁵ *Wuesthoff v. Germ. L. L. Co.*, 107 N. Y. 580, 581.

⁶ *Watkins v. Dean*, 10 Yerg. (18 Tenn., 1837), 321.

⁷ *Johnson v. Yancey*, 20 Ga. 707, 708; *Hannig v. Hannig* (Tex.), 24 S. W. R. 695; *Crocker v. Smith*, 94 Ala. 295.

as such until it is delivered. The title passes only upon delivery to the grantee, whether possession is to take effect at once or at some future date. Hence if the subscriber to the deed retains possession of it during his life, it may be presumed, in connection with the acquiescence of the other party, that he intended that it should operate as a will and that it should be revocable during his life.¹ But the retention of the writing by the grantor or its non-delivery to the grantee is never conclusive. A deed may be executed and retained in the possession of the grantor or of some other person, as in escrow, to be delivered to the grantee upon the death of the grantor.² Thus, an instrument having the form of a deed, signed, sealed and acknowledged by a grantor on his death-bed, and handed to the attending physician to be kept by him until the death of the grantor, when it is to be recorded, is a deed and not a will.³ On the other hand, the fact that the instrument is delivered to the grantee named, and that *it is registered or recorded* in the office of the register of deeds or of some similar official, is material evidence that the parties intended that it should operate *inter vivos*. Such proof may destroy the testamentary and revocable character of the writing.⁴ In order that a will may be admitted as evidence it must be admitted to probate. Hence, though an instrument which is in form a deed, is properly executed and recorded to operate as such, if it is in fact a will it must be admitted to probate before the law will recognize it as evidence.⁵ If from all the evidence it appears that the instrument was intended to operate as a deed it cannot be probated. This is true even though because of an informality of execution the instrument will fail to operate as a deed.⁶

¹ Carey v. Dennis, 12 Md. 1, 19.

² Stout v. Rayl, 146 Ind. 379, 45 N. E. R. 515.

³ Deifendorf v. Deifendorf, 132 N. Y. 100, 30 N. E. R. 375.

⁴ Majoribanks v. Hovenden, 1 Dru. 11.

⁵ Poore v. Poore, 55 Kan. 687, 690.

⁶ Edwards v. Smith, 35 Miss. 197, 200. In Donald v. Nesbitt, 89 Ga. 290, 15 S. E. R. 367, where an instrument was executed in the form of a deed but not delivered, the court, in de-

ciding that the instrument was testamentary in its character, relied greatly upon the words: "But in no event is this deed to go into effect until after my death." But on the other hand, where the instrument was acknowledged and recorded ten years before the death of the grantor, the court held that a reservation, "The grantor reserves from this grant all the estate in said lands, and the use and occupation, rents and proceeds thereof, unto himself dur-

§ 45. A writing that is invalid as a will may be valid as a deed.—The law does not look with favor upon informal instruments, the testamentary character of which is in doubt. The party who propounds for probate writings in the form of deeds, contracts or letters has the burden to prove that they were executed *animo testandi* and in conformity with all the statutory formalities. But it does not follow that because the paper offered for probate is void as a will because improperly executed or attested that it is altogether invalid. The paper, whether deed or simple contract, will be given its due and appropriate effect so far as its character and execution conform to and are consistent with recognized rules of law.¹ But it does not follow, on the other hand, that because an instrument in the form of a deed cannot operate as such because of a neglect upon the part of the grantor to observe some technical requirement—as, for example, where there has been no delivery to the grantee,—that a court of probate must of necessity give it effect as a will in a case where it is clear that the maker of the instrument had no testamentary intention in executing it.²

ing his natural life," did not deprive the instrument of its character as a deed and render it necessary that it should be attested as a will, and admitted to probate. *Cates v. Cates*, 135 Ind. 272, 34 N. E. R. 957. In *Habergham v. Vincent*, 2 Ves. Jr. 204, the testator executed a will in which he devised property to such persons as he should by deed appoint. He subsequently executed a deed, by which, after reciting the power reserved in the will, he said: "Now know ye, that, by this deed poll, I do direct and appoint that my trustees shall immediately after my death convey the land to" persons named

The court held this paper to be in the nature of a codicil to his will, and, as it was attested by only two witnesses, ineffectual to pass his freehold estates.

¹*Stewart v. Stewart*, 5 Conn. 317, 320; *Bristol v. Warner*, 19 Conn. 7.

²*Edwards v. Smith*, 35 Miss. 197. An instrument, denominated on its face a last will, giving no present interest in property, but only the estate of which the maker dies seized, signed and delivered before the death of the maker, but not witnessed, is valid neither as a will nor as a deed. *Poore v. Poore*, 55 Kan. 687, 41 Pac. R. 973.

CHAPTER IV.

THE CHARACTER OF THE PROPERTY WHICH MAY BE DEVISED.

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| <p>§ 46. Devises of lands held adversely to the testator.</p> <p>47. Whether possibility of reverter and right of entry upon breach of condition may be devised.</p> <p>48. The equitable right to have a conveyance set aside may be devised.</p> <p>49. Future and contingent interest, to what extent devisable.</p> <p>50. Power to devise contingent estates and reversions.</p> <p>51. Future possibilities not coupled with an interest are not devisable.</p> <p>52. The power to devise estates held in co-tenancy.</p> <p>53. Nature and validity of bequests of choses in action.</p> <p>54. The testamentary power over leases and other chattels real.</p> <p>55. Devisability of estates <i>per autre vie</i>.</p> | <p>§ 56. The power to dispose of an insurance policy on life of the testator.</p> <p>57. Bequest of insurance due the testator.</p> <p>58. Power to devise community property.</p> <p>59. Power to devise the homestead.</p> <p>60. The effect of the will on lands acquired after its execution — Common-law rule.</p> <p>61. The common-law rule in the United States as to after-acquired lands.</p> <p>62. The statutes conferring power to dispose of after-acquired lands — Language showing the intention of the testator under these statutes.</p> <p>63. Operation of a will upon an equity of redemption subsequently acquired by a mortgagee.</p> <p>64. After-acquired personal property.</p> |
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§ 46. **Devises of lands held adversely.**—By the statutes of 32 Henry VIII., c. 1, and 34 & 35 Henry VIII., c. 5, the power to devise lands was conferred upon all persons (with a few exceptions), provided they were *seized* in fee of the lands, either in possession, reversion or remainder.¹ In construing these statutes the courts held that the owner of land who was actually disseized at the date of the execution of his will could not devise it, for the reason that he was seized of no estate in land in possession, reversion or remainder.² But the Victorian

¹ *Ante*, § 3.

² *Goodright v. Forrester*, 8 East, 552, 564, 567, 1 Taunt. 578; *Cave v. Holford*, 3 Ves. 669; *Attorney-General v. Vigor*, 8 Ves. Jr. 256, 282;

Souter v. Hull, 2 Dowl. & Ry. 38; *Baker v. Hacking*, Cro. Car. 387, 403; *Cooper v. Finch*, 1 New & M. 130. *Cf.* *Culley v. Taylorson*, 11 Ad. & Ellis, 1020.

Statute of Wills, § 3, provides, *inter alia*, that it shall be lawful for every person to devise all real estate and all personal estate *which he shall be entitled to*, either at law or in equity; providing, also, that such power shall extend to all rights of entry for conditions broken and other rights of entry. A person, therefore, is now able to devise lands of which he is *not* seized at the date of the execution of his will or at his death. Prior to this statute the distinction was made that, though executory and contingent interests were devisable if they were descendible, yet rights of entry upon land of which the testator was not seized, being rather of the nature of rights of action than interests in land, were not devisable, because of the policy of the common law that rights of action could not be transmitted or assigned. The English statute making rights of entry devisable has been followed in the United States. Actual possession or seizin of the land is now never required to be in the testator; and he may devise real property of which he is disseized at the date of his death, and his devisee may bring ejectment to recover possession.¹ But the rule in the United States, in the absence of statute, according to early cases following the English rule, was that land of which the testator is disseized cannot be devised, except to that person by name who holds adversely, in which case the devise to him operated as a release.² The true criterion to be employed at the present time in determining if an estate is devisable is, Is it descendible? Descendible and devisable are convertible terms; and, as it is admitted on all sides that a right of entry upon land, either against one who holds over after the termina-

¹ *Patty v. Goolsby*, 51 Ark. (1881), 61, 71; *Swift v. Lee*, 65 Ill. 336; *Gist v. Robinet*, 3 Bibb (6 Ky., 1813), 2, 5; *Lux v. Pallett*, 1 Har. & J. (Md.) 83; *McKeel v. Woodford*, 4 Har. & McH. (Md.) 287; *Hayden v. Stoughton*, 5 Pick. (Mass.) 528; *Willard v. Twitchell*, 1 N. H. (1818), 177; *Hadduck v. Wilmarth*, 5 N. H. (1830), 188; *Whittemore v. Bean*, 6 N. H. (1831), 47; *Stover v. Whitman*, 6 Binn. (Pa., 1814), 416; *Yeatman v. Haney*, 14 S. W. R. 1045; *Watts v. Cole*, 2 Leigh (Va., 1830), 653, 664; *Hyer v. Shobe*, 2 Munf. (Va.) 200; *Inglis v. Sailors'*

Snug Harbor, 3 Peters, 99; *Turpin v. Turpin*, 1 Wash. C. C. (1804), 75.

² *Poor v. Robinson*, 10 Mass. (1813), 131, 135; *Watts v. Cole*, 2 Leigh (Va., 1811), 200, 203. See also *Varick v. Jackson*, 7 Cow. (N. Y., 1827), 166, 202, 233, in which the question, though not directly determined, was discussed in a most thorough manner and with very great learning, particularly in the argument of Mr. Van Buren. See also *Saunders v. Lord Annesley*, 2 Sch. & Lef. 104, 2 Co. Lit. III, 240b.

tion of his estate, or against one who holds lands where a right of entry has accrued upon condition broken, or against one who holds lands by actual disseizin of the true owner, passes to the heirs, logically no reason exists preventing its devise.

But in this connection it may be well to distinguish between the actual disseizin of the true owner by an open and adverse possession, and disseizin by election. In the former case the land is held under a claim of title which is adverse to that of the testator *ab initio*. That is to say, the disseisor has entered on the land by a title adverse to that of the true owner, and continues to hold by the same wrongful title. But in the case of disseizin by election, the disseisor has entered by a lawful title, and is merely holding over wrongfully as against the true owner, as in the case of a tenant for years who is holding over after the expiration of his term, though not denying the validity of his landlord's title. In the latter case there has never been any doubt that the land thus held by the tenant after the termination of his lease may be devised, as the reversion is admitted to be in the landlord, the seizin of the tenant being the seizin of the landlord.¹

§ 47. Whether possibility of reverter and rights of entry upon breach of condition may be devised.—The question whether the testator can devise a mere possibility of reverter has been discussed. In the case of a devise or a grant of a fee-simple upon a condition subsequent, the grantor, or devisor, parts with the fee absolutely; and it remains in the grantee, or devisee, until a breach of condition. All that the grantor has until that time is a *possibility of reverter*—not a *reversion*; and at common law only the grantor or his heir could claim the benefit of the breach of condition. His right was neither

¹ *Souter v. Hill* (1822), 2 Dow. & Ry. 38, 42. The rule of the common law that a man who had *only* the right of possession could not convey it to another, which was based upon the supposition that such conveyances would tend to promote maintenance, litigation and the oppression of the poor by the rich, is extremely ancient. The rule of the common law was affirmed by statute 32 Henry VIII., c. 9, which, by the construc-

tion of the courts, was held applicable to copyhold and leasehold, as well as to freehold, estates. At what period the above rule, which in its principles was originally confined to landed estates, was extended to mere personal chattels, as bonds and judgments, it is difficult to say. That this must have happened at an ancient date is evident from the very early mention of it in the text-writers. Co. Lit. 214a; 2 Black. Com. 290.

assignable nor devisable, for "nothing which lies in action, entry or re-entry can be granted over,—to discourage maintenance."¹ Until breach of condition and forfeiture *no estate is in the grantor or his heir*. Hence a statute which provides that interests or estates in real property descendible to the heirs shall be devisable has no application to a possibility of reverter, which is not *an estate descendible to heirs* until the breach of condition takes place.² This is the well-settled rule in the state of New York,³ though elsewhere a different rule is recognized. Thus, it has been held that a mere possibility of reverter is devisable, and that it passes under a general or residuary devise of the estate of the grantor.⁴ Thus, where the testator devised land for a school, upon condition that it should be erected within a period specified, and devised all the rest and residue of his property to A., the latter took the possibility of reverter which would otherwise have gone to the heirs, and which he might enforce on the failure of the devisee of the land to erect a school within the period specified.⁵

And where a testator devises land in fee in trust for persons who are unborn, the possibility of a resulting trust exists in favor of his heirs until such persons are born. The same principle is applicable where the trust created is invalid, or there remains a surplus after the trust is executed. And this possibility of a resulting trust in favor of the heirs of the testator, being coupled with an interest, is descendible and also devisable by

¹ Greenl. Cruise, tit. 18, ch. 1, § 15. At common law a reversion in fee expectant on an estate tail which had been discontinued, being a right of action, was not devisable. *Baker v. Hacking*, Cro. Car. 387, 405. *Contra*, *Steel v. Cook*, 1 Met. 281, 283.

² *Upington v. Corrigan*, 151 N. Y. 143 (1897), 45 N. E. R. 859, 29 N. Y. S. 1002, 79 Hun, 488, and *Trustees, etc. v. Venable*, 159 Ill. 215, 42 N. E. R. 836.

³ *Jackson v. Topping*, 1 Wend. (N. Y., 1828), 122, 127; *Vail v. Railroad Co.*, 106 N. Y. (1887), 287, 12 N. E. R. 606; *Southard v. Railroad Co.*, 26 N. J. L. 21; *Nicoll v. Railroad Co.*, 12 N. Y. (1855), 121; *Towle v. Remsen*, 70 N. Y. 312.

⁴ *Austin v. Parish*, 21 Pick. (38 Mass., 1836), 215, 223; *Watts v. Cole*, 2 Leigh (Va.), 653, 664; *Jones v. Roe*, 3 T. R. 38, and see cases in note, page 57; but *contra*, *Deas v. Horry*, 2 Hill (S. C., 1835) Eq. 244, 248; *Blackstone's Com.* 290, and *Jackson v. Waldron*, 13 Wend. (N. Y., 1834), 178; *Martin v. Strachan*, 5 T. R. 107. See also *Pinney v. Newton*, 66 Conn. 141, 33 Atl. R. 591.

⁵ *Hayden v. Stoughton*, 5 Pick. (22 Mass. 1827), 528, 539; *Doe v. Scott*, 3 Maule & Sel. 300; *Brigham v. Shattuck*, 10 Pick. (27 Mass.) 306, 309.

the heirs by a will going into effect after the death of the testator, but not during his life-time.¹

§ 48. Equitable right to have a conveyance set aside may be devised.—The peculiar interest or right which a grantor has in a conveyance made by him under circumstances which entitle him to have it set aside in equity as procured by fraud or coercion is not a right of entry. The possession of the grantee is not adverse to the grantor, nor has the latter the right to bring a legal action of ejectment or an action to try the title to the land. His remedy is purely equitable. He may have the conveyance set aside in a court of equity as having been procured by fraud, coercion and undue influence, and the court will regard the grantee as a trustee for the grantor and order him to make a valid reconveyance of the legal title. The estate or interest of the grantor in the land consists of a right to institute a suit in equity to have the conveyance set aside, and this interest or right he may devise. He may by devise confirm the title of the grantee, if it be shown, as would be required in the case of a confirmation by deed, that he was fully aware that his will would confirm an act which he had the right to have set aside.² He may devise his right to bring suit in equity, and his devisee has the same right to bring a suit to set aside the conveyance as the testator had.³

§ 49. Future and contingent interests, to what extent devisable.—At common law it was the rule that mere future estates or possibilities, whether contingent or vested, were not assignable;⁴ but in equity a different rule was recognized, and the assignment of future interests was regarded as valid, if based upon a good or valuable consideration. So far as the devisability of future interests is concerned, the authorities make a distinction between mere possibilities and future estates. It is now by statute the general rule that all future interests in property, whether real or personal, vested or contingent, may be disposed of by will, provided only that the interest does not terminate with the life of the owner. Where

¹ *Carney v. Kain*, 40 W. Va. 758, 23 S. E. R. 650. See § 478, *post*. 2 D. & W. 184, 1 Con. & L. 291; *Grasley v. Moseley*, 4 De Gex & Jo. 78, 93;

² *Stump v. Gaby*, 2 De G., Mac. & G. 623, 631. *Stump v. Gaby*, 2 D., M. & G. 623, 631. Cf. *Carroll v. Narwood*, 5 Har. & J.

³ *Smithwick v. Jordan*, 15 Mass. (Md.) 162; *post*, § 254. 4 10 Co. 48.

(1818), 113, 115; *Uppington v. Bullen*,

the interest is descendible, or where it devolves on the next of kin, the estate is devisable. Under the head of possibilities coupled with an interest may be included vested and contingent remainders and executory devises, future trust estates, known technically as springing and shifting uses, where the person to take is ascertained, and also reversions expectant upon the termination of an estate tail, and perhaps (though this is doubtful) a possibility of reverter upon the termination of an estate upon condition.¹ All such interests are devisable. As distinct from these, we have possibilities which are *not* coupled with any interest. Examples of these are the expectation of an heir or of the next of kin, or of the legatee or devisee under a will, during the life-time of the ancestor or the testator; or any contingent interest where the person to take is uncertain, as a gift by will to a class of persons after a life estate; *e. g.*, a gift to the heirs, or next of kin, or children of A. who may be living at his death, while A. is alive. On the other hand, all executory and future estates coupled with an interest are devisable.

If the estate is vested in the party who disposes of it by will (though his right to possession is postponed), the estate will pass to his devisee according to the nature of the interest which the testator had. The devisee may assert his title to the estate as soon as the event happens upon which it was to pass into the possession of the devisor. Thus, where land was limited to A. in fee, if he should attain the age of twenty-one, though not to be enjoyed by him until after the termination of a life estate therein; and A., having attained the age of twenty-one, made a will by which he disposed of all his estate, and then died before the life tenant, it was held that his interest passed under the will.²

¹ *Fortescue v. Satterthwaite*, 1 Ired. (23 N. C.) L. 556, 570; *Brown v. Williams*, 5 R. L. (1858), 309; *Heard v. Read*, 169 Mass. 216, 47 N. E. R. 778. See *ante*, § 47.

² *Roe d. Perry v. Jones*, 1 H. Black. 30, 3 T. R. 88. See also *Woodman v. Woodman*, 89 Me. (1897), 129, 133; *Loring v. Carnes*, 148 Mass. 223; *Pearce v. Savage*, 45 Me. (1858), 90. "All contingent and executory interests are assignable in equity, and

will be enforced if made for a valuable consideration; and it is settled that all contingent estates of inheritance, as well as springing and executory uses, and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent and devisable and assignable. If the person is not then ascertained, they are not then possibilities coupled with an interest, and they cannot be either devised or

§ 50. Power to devise contingent estates and reversions.

The power to devise future and executory estates is not confined to those which are vested in title. All future and *contingent* interests which are descendible may be devised and bequeathed.¹ The distinction is between contingent estates where the *person to take is certain*, and those where he is uncertain, and the happening of the contingency is necessary to determine who is to take. The former are devisable, the latter are not.²

A reversion in the testator after an estate for years or for life is devisable, and passes under a general devise. A devise of the estate "to which I may be entitled at the time of my death" includes a reversion.³ So, too, a reversion expectant upon the determination of the estate tail is devisable.⁴ A devise to A. in fee if he survives his wife, or has a child that lives to the age of twenty-one, but failing this, then over, cre-

descend at the common law. Contingent and executory as well as vested interests pass to the real or personal representatives according to the nature of the interest, and entitle the representatives to them when the contingency happens." 4 Kent, Com. 261.

¹ 2 Black. Com., § 290.

² Drew v. Wakefield, 54 Me. 291, 299; Patty v. Goolsby, 51 Ark. 61, 71; Gist v. Robinet, 2 Bibb (Ky.), 2, 5; Woodman v. Woodman, 89 Me. 129, 133; Merriam v. Simonds, 121 Mass. 198, 202; Heard v. Read, 169 Mass. 216, 47 N. E. R. 778; Den v. Manners, 20 N. J. L. 142, 144 (this was a devise of a contingent remainder); Brooks v. Kip, 54 N. J. Eq. 462, 35 Atl. R. 658; George v. Green, 13 N. H. 525, 527; Munsell v. Lewis, 4 Hill (N. Y.), 635; Wright v. Trustees, 1 Hoff. Ch. (N. Y., 1839), 225; Varick v. Edwards, 1 Hoff. Ch. (N. Y., 1840), 382, 395, 406; Lawrence v. Bayard, 7 Paige (N. Y., 1838), 70; Vankleeck v. Church, 6 Paige (N. Y.), 600; Jackson v. Waldron, 18 Wend. (N. Y.) 178; Fortescue

v. Satterthwaite, 1 Ired. (N. C.) 566, 571; Bailey v. Hoppin, 12 R. I. 560; Loring v. Arnold, 15 R. I. 428, 430, 8 Atl. R. 335; Sutton v. Miles, 10 R. I. 348, 353; Jones v. Roe, 3 T. R. 88, 93, 96; Selwyn v. Selwyn, 1 W. Bl. 222, 251, 2 Burr. 1134, 1 H. Bl. 30-34; Doe v. Scott, 3 M. & S. 300. In New York future and expectant estates are devisable by statute. Lawrence v. Bayard, 7 Paige, 70, 76. A similar rule is recognized by the statutes of many other states. Mere possibilities, if coupled with an interest, were always assignable in equity. Lawrence v. Bayard, *supra*. "The interest under a contingent remainder, or executory devise, or future or springing use, is devisable. All contingent possible estates are devisable, for there is an interest. But the mere possibility of an expectant heir is not devisable, for that is not within the principle." 4 Kent's Com., p. 498.

³ Blakely v. Quinlan (Ky., 1897), 39 S. W. R. 513.

⁴ Steel v. Cook, 1 Metc. (42 Mass., 1840), 281, 283.

ates an estate in the remainder-man who is to take the fee over, which is devisable.¹

§ 51. Future possibilities not coupled with an interest are not devisable.—A mere possibility of receiving something valuable not connected with an interest is not devisable. Thus, the expectation of an heir apparent to succeed to the estate of his ancestor, or of a devisee under a will, or the beneficiary under an insurance policy,² is a mere possibility, not devisable. In the one case, the heir has no interest in the land until the death of the testator, and he may be disappointed and disinherited, either by the conveyance of the land or its devise to some other person.³ So a possibility of receiving property under a will is not devisable. Thus,⁴ where an estate was devised to A. and B. for their joint lives as tenants in common, with remainder to the survivor, it was held that each had a mere possibility, which was not devisable during the life of the other,⁵ as until one is dead it cannot be known whether the fee will vest in the other.⁶ Again, a mere expectation of receiving a reward or a gratuity from the government, or from a private individual, being a possibility not coupled with an interest, and not assignable, cannot be disposed of by will.⁷

But money received in satisfaction of a valid claim against the government under a statutory provision is not a gratuity and may be devised.⁸

¹ *Griffin v. Shepard*, 26 N. E. R. 339, 124 N. Y. 70, 40 Hun, 355.

² § 56.

³ *Carleton v. Leighton*, 3 Mer. 671; *Jones v. Roe*, 3 T. R. 88, 93, 96; *Fearne, Con. Rem.* 366; 4 Kent, Com. 496; *Den v. Manners*, 20 N. J. Law, 142, 145; 2 Black. Com., p. 290.

⁴ *Tompkins v. Tompkins*, 2 M. & Sel. 165.

⁵ Compare note 4, page 64, § 52.

⁶ *Wilken v. Young* (Ind., 1898), 41 N. E. R. 68.

⁷ *Munsell v. Lewis*, 4 Hill (N. Y., 1843), 635, 640; *Vasse v. Comegys*, 4 Wash. C. C. (1825), 570, 573, 574, 1 Peters, 193, 213; *Campbell v. Mullett*, 2 Swanst. 551, 571, 576-599. If A., being the heir of B., or a devisee

under the will of B., shall devise his expectations and shall die before B., neither he nor his heirs nor devisee shall take through him. If A. survive B., his general or residuary devisee shall take nothing by a will if made during B.'s life, but otherwise by a will after his death. And *Glenn v. Belt*, 7 Gill & J. (Md.) 362; *Spence v. Robbins*, 6 id. 507.

⁸ In *Pierce v. Stidworthy*, 79 Me. 234, 239, 9 Atl. R. 617, the testator, who died in 1875, gave "all the residue of which I die possessed, or to which I may be entitled," to A. Vessels owned by him had been destroyed by the Confederate cruiser *Sumpter*, and in 1884 the executor, under the act of congress of June 5,

§ 52. The power to devise estates held in co-tenancy.— Tenants in common or coparceners, whether their interests be vested or contingent, have each a separate and distinct interest, and enjoy absolute power to devise their undivided shares. The devisee of any tenant in common or coparcener takes all the interest which his deviser has devised him, whether it be all or only a part of the interest which such deviser had as a tenant in common.¹

The rules of law regulating the devise of land held in other species of co-tenancy are otherwise. In the case of tenancy by the entirety, neither the husband nor the wife can dispose of his or her share by will, nor incumber it, nor charge it in any way; for, upon the death of either, the whole interest goes at once to the survivor, and this is to go, not from the deceased tenant to the survivor, or as a new acquisition by the survivor, but as an increase of the estate given him under the original instrument creating the tenancy by the entirety.² In the absence of statute, an estate by the entirety cannot be partitioned by the co-tenants, but will go to the survivor in fee-simple, and on his or her death will descend to his or her heirs.³ When the estate has thus become descendible in the survivor, it may also be devised as soon as it is vested absolutely either in the husband or the wife.⁴ According to the rules of the common law, the devisable character of the interests of the tenants of an estate in joint tenancy depends upon the nature of the estate. If either tenant of a joint estate made a will devising his or her share, and died *during the life of the other*, the devise was void, because the title of the co-tenant by sur-

1882, claimed and was awarded a sum of money out of the sum awarded against Great Britain. It was claimed that this money did not pass under the residuary clause, and was merely a donation from the federal government, as the cruiser which had caused the damage was not expressly named by the tribunal in making the award. The court overruled this objection and directed the money to be paid to the residuary legatees. *Comegys v. Vasse*, 1 Pet. (26 U. S.) 193; *Erwin v. United States*, 97 U. S. 392; *Leonard v. Nye*, 125 Mass. 455; *Grant v.*

Bodwell, 78 Me. 460. See also *Taft v. Marsily*, 120 N. Y. 474; *Leffingwell's Appeal*, 62 Conn. 347; *Williams v. Head*, 140 U. S. 529.

¹ *Simmons v. Spratt* (Fla.), 8 S. Rep. 123.

² 2 Black. Com. 181; *post*, § 541.

³ § 542.

⁴ And the fee thus vested in the survivor would pass under a general or residuary clause in his will, though executed before the death of his co-tenant, where, by statute, a will operates upon land acquired after its execution. See § 543.

vivorship was paramount to the title of the devisee or legatee of the deceased tenant.¹ On the other hand, if the other joint tenant should die before the testator, but *after he made his will*, so that the testator took the fee-simple by his right of survivorship, his devise would be void at common law, because he was not *seized of the estate at the time of making his will*, as required by the statute. Under modern statutes, however, which have so far changed this rule of the common law that land acquired subsequent to the execution of the will now passes under it, if owned at the death of the testator, this rule would not apply; and it never did apply to a general or residuary bequest of all the personal property of the testator, who at the date of executing a will was a joint tenant in leasehold or other personal property, and who acquired an absolute ownership of the same by survivorship.²

§ 53. Nature and validity of bequests of choses in action.

On the death of the testator his executor at once steps into his shoes so far as all matters of contract to which he was a party at his death and ownership of personal property are concerned. The personal representative has the exclusive right to enforce by legal proceedings all contracts to which the testator was a party; and on this account all debts, whether simple contract debts or under seal, all notes, bills payable and other choses in action, disposed of by the will, pass to the executor as part of the personal property which the law casts upon him. But this fact has never been regarded as depriving choses in action of a bequeathable character. The statutes of Henry VIII. were confined exclusively to devises of real estate,³ while the later English statutes have in no way modified the power to bequeath choses in action or other personal property. The owner of the chose in action may bequeath it, but the legatee does not, as would be the case in a devise of real property, take his title from the testator. He takes title from the executor; and it is for the executor, or the administrator with the will annexed, to enforce all contracts and choses in action against the persons who are obligated, in the absence of an express direction

¹ *Post*, § 532; Co. Lit. 185, 9; *Mette v. 262*; *Coates v. Stevens*, 1 Y. & C. Ex. Feltigan, 148 Ill. 357, 36 N. E. Rep. 81; 66. See *post*, § 541.

Dummer v. Pitcher, 2 Mylne & K. ² *Post*, § 64.

³ § 46, p. 56.

that such choses in action shall be enforced by some other person.¹ The law, in the absence of a direction to the contrary, casts the right and duty to sue upon the executor or administrator. But the testator has the power not only to bequeath choses in action whatever they be, but also to bequeath the right to sue upon them, or, in other words, to direct that his executor shall transfer them *in specie*, *i. e.*, as specific legacies, together with all rights to enforce them by legal process, to the person whom the testator has designated.² But in the absence of such direction the mere bequest of the chose in action will not pass the right to sue on it to the legatee *in his own name* in the absence of a statute to that effect.³

§ 54. **The testamentary power over leases and other chattels real.**—Chattels real are “such as savor of or concern the realty.” They are chattel interests which arise out of, or are annexed to, lands held in freehold, but which are not themselves of a freehold nature. The disposition of these chattel interests is governed by the rules which regulate the disposition of personal property; that is, they may be bequeathed, but not to the legatee directly.⁴ They devolve upon the executor, forming a part of the personal estate of the testator.⁵ In early times, when nearly all land in England was held by military tenure, the right of the lord to the guardianship of an infant tenant during minority was a chattel real, and went to the executor or administrator of the lord, and not to his heir.⁶ In modern times, however, the most numerous class of chattels real are leases for years and terms in land, including devises⁷ which are not of inheritance, or which are not for the

¹ *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. R. 461.

² *Post*, §§ 405, 407, 408.

³ *Bishop v. Curtis*, 21 L. J. Q. B. 391; *Hayes v. Hayes*, 45 N. J. Eq. 461. The personal representative, in the absence of statute, has the right to dispose of all choses in action not specifically bequeathed without an order of the court or an express power of sale. *Chandler v. Chandler*, 87 Ala. 300, 6 S. R. 153. If a statute forbids the sale of personal property, unless the testator has expressly authorized it, or by order of the court, an as-

signment by an executor conveys no title. *Winningham v. Holloway*, 51 Ark. 885, 11 S. W. R. 579. See also *post*, § 791.

⁴ See § 53.

⁵ A ground rent reserved to the testator may be bequeathed as personal property, and the legatee takes it subject to being redeemed by the grantee of the land. *In re Hirst's Estate*, 147 Pa. St. 319, 23 Atl. R. 455.

⁶ Co. 1 Inst. 118b; *Williams, Ex'rs*, p. 740.

⁷ *Hellwig v. Bachman*, 26 Ill. App. 165.

life of the tenant or devisee, or for the life of another. In other words, any interest in land for a definite period of time, be it for days, months or years, is a chattel real, though in point of time it may endure for a thousand years. Such being the case, it passes as personal property to the executor.¹ But the term "chattel real" is not confined to leases; it includes rights of common and easements in land, licenses and market privileges, and in England the right to present to a church. Though a chattel real may have been specifically bequeathed, it will vest at once in the executor for the purposes of the estate. The legatee has no claim upon or right to or in it which he does not take from the executor.²

§ 55. *Devisability of estates per autre vie.*—Estates for the life of another were first made devisable in express terms by the English Statute of Frauds.³ Prior to that these estates occupied a very peculiar and anomalous position. An estate for the life of A. was always regarded as a freehold.⁴ If it was

¹ Co. Lit. 46a; 2 Kent, 842; 2 Black. Com. 38; *Hellwig v. Bachman*, 26 Ill. App. 165; *Schee v. Wiseman*, 79 Ind. 389, 392; *McDowell v. Hendrix*, 67 Ind. 513, 517; *Ellis v. Wren*, 84 Ky. 254, 1 S. W. R. 440; *Lewis' Heirs v. Ringo*, 3 A. K. Marsh. (Ky.) 247, 249; *Ex parte Gay*, 5 Mass. 419; *Gutzweiler v. Lackman*, 39 Mo. 91, 97; *Brewster v. Hill*, 1 N. H. 350; *Murdock v. Ratcliff*, 7 Ohio, 119; *Beeker v. Walworth*, 45 Ohio St. 169.

² The character of the duration of the interest in lands determines whether it is to be regarded as a chattel interest or as a freehold. If the duration of the estate is indefinite in time, as where it is for one's own life or for the life of another, or to a woman until she shall marry or while she remains a widow, or to a man and woman during coverture, or until the grantee shall fail to perform a condition subsequent, or for any other uncertain time, it is a freehold estate, as it may endure for the owner's life; and if it endures longer it is not comprised under personal

estate, but passes under the will directly to the residuary or specific devisee, or, in case of an intestacy, to the heir. The executor or administrator of the owner takes no title to or interest in it. But the mere fact that a lease for a definite number of years is made to a man *and his heirs*, or to a corporation sole or aggregate, does not alone make it a freehold estate; and on the death of the lessee it will pass as personalty to his executor. Again, a lease for a term of ten years to A., if B. shall live so long, is not a freehold interest, but a chattel, devolving as personalty on the executor of A. An estate to a man and his heirs, or conveyed by other words of inheritance by which the grantee takes a fee-simple, creates a freehold estate in the land which passes to the devisee under the will of the grantee, and with which his executor has nothing to do. *Knapp v. Jones*, 143 Ill. 375, 33 N. E. R. 383.

³ 29 Car. II., c. 3, § 12.

⁴ *Ante*, § 54.

to A. and his heirs during the life of B., and A. died before B., the estate descended to the heir of A., who held it as "special occupant," as it was termed, during the life of B. The rule of descent was the same where an estate was to a man, *his heirs, assigns, executors* and administrators during the life of another,¹ or to A. and his heirs and assigns to hold to him and his assigns during the life of B.² The heir of A. took in each case as special occupant, and the other words were rejected. The interest which went to him was devisable by A. for the reason that it was descendible, and though it was assets in the hands of his heir, yet it did not go to the administrator of A. if A. died intestate.

In the case of an estate to A. for the life of B., *no words of inheritance being contained in the limitation to A.* to show that in the case of his death before B. the estate was to go to his heir, the question arose, in case B. survived him, who was to take the estate upon the death of A. Before the matter was regulated by statute it was the law that he who first obtained possession after the death of the owner during the life-time of the *cestui qui vie* should hold it.³ He was called the general occupant. The statute⁴ provided *inter alia, first*, that an estate *per autre vie*, not in terms to the owner and his heirs, might be disposed of by will; and *second*, that if not so disposed of it devolved upon the administrator as *personalty*. When disposed of by will it passed to the executor as personal property.⁵ The effect of the statute was to place the executor of the first owner in the position of the heir, who took, as special occupant, a position which, prior to the statute, could only be occupied by the latter. The question then arose, could the executor take under the statute as a special occupant in a case where the estate for the life of another was of such nature that he would not have been able to take, because the estate was an incorporeal hereditament, as in the case of a rent reserved to A., his executors and administrators, for the life of B. It was determined that where a rent charge was granted to a man during

¹ Atkinson v. Baker, 4 T. R. 229;
Carpenter v. Dunsmore, 3 El. & Bl.

⁴ 29 Car. II., c. 3, sec. 12.

⁵ Wright v. Trustees, 1 Hoff. Ch. 918, 928; Wright v. Trustees, *infra*.

(N. Y., 1839), 202, 225; 2 Rev. St. N. Y. 82, § 6; 2 Black. Com., p. 259.

² Doe v. Steele, 4 Q. B. 663.

³ 2 Black. Com. 259.

the life of another, but without further words, it should go, under the statute, to the executor of the first owner, though not named, on his death prior to the *cestui qui vie*.¹

The owner of an estate for the life of another might, under the statute, dispose of the whole term which might exist after his death, whether it was to him and his heirs or to him without words of inheritance. If he devised the remainder of the estate to A. without words of inheritance, the devisee, under the rule of the common law,² took an estate for life only; and if he, in turn, died before the death of the *cestui que vie*, the remnant of the estate went to the heir of the devisor as special occupant.³ But the first owner of the estate for the life of another may devise it by language which, while it clearly manifests an intent to dispose of all the interest which may survive him, does not leave it clear on whom that interest is to devolve in case of the death of the devisee before the death of the *cestui que vie*. If the estate is limited to A. and his heirs, and he devise it in general terms, as to B. generally and without words of limitation, and the devisee dies intestate before the death of the *cestui que vie*, the estate goes to the heirs of the devisee as real property.⁴

By statute 1 Vict., c. 26, sec. 3, it is provided that "estates *per autre vie* may be disposed of by will, whether there shall or shall not be any special occupant thereof, and of whatever tenure they shall be, and whether they shall be incorporeal or incorporeal hereditaments." The Statute of Frauds, while it enabled the owner of an estate *per autre vie* to dispose of it, whether or not there was any special occupant, failed to determine to whom the surplus remaining in the hands of the administrator should go in case the owner failed to devise it. The question usually arose between the heir and the next of kin where there was no special occupant, but where the adminis-

¹ *Bearpark v. Hutchinson*, 7 Bing. 178, 187; *Jenison v. Lexington*, 1 P. Wms. 555, 556; *Northern v. Carnegie* (1859), 4 Drew. 587, 592; *Kendal v. Micfield*, *Barnard Ch. Cases*, 46.

² *Post*, § 679.

³ *Doe v. Robinson*, 8 B. & C. 296, 306.

⁴ *Blake v. Jones*, 1 Hud. & Bro. 227;

Phillpott v. James, 3 Dougl. 425; *Wall v. Byrne*, 2 Jo. & L. 118. *Contra*: Where the estate was to A. and his heirs and assigns, and A. devised it to B. and his assigns, and B. died, the court held that the property was personality and went to the next of kin of B., he not having assigned it. *Doe v. Lewis*, 9 M. & W. 662, 663.

trator took as such under the statute. By statute 14 Geo. II., c. 20, 9, it was provided that in such case the estate *per autre vie* should be applied and distributed in the same manner as the personal estate of the deceased.

And where an estate is limited to a man, his executors, administrators and assigns for the life of another, and he dies, making a will valid to pass personal estate and disposing of his personal property, not specifically mentioning the estate *per autre vie*, it was held that the residuary legatee should take. The executor could not take for his own benefit, but took title under the will for those pointed out therein by the testator.¹

§ 56. **The power to dispose of the proceeds of an insurance policy on life of the testator.**—The determination of the question whether the testator can dispose of the proceeds of an insurance policy, payable on his death, depends wholly upon the terms of the contract of insurance to which he is a party. Where the insurance is payable to *the insured*, or to *his estate*, or to *his executors*, the proceeds may be bequeathed by him and will pass under a general or residuary bequest of his property.² Thus, a *solvent* testator, leaving a wife but no child, may dispose by will of the proceeds of an insurance policy on his life to a person other than his wife, though, by a statute, it is provided that such money shall not constitute assets for the payment of debts, but shall descend to the wife and child.³ So, where a policy provided that the insurance money shall be paid to devisees or heirs,⁴ or such persons as the insured may designate by will, or by entry on the books of the lodge, it was held that the proceeds of the policy would pass under a bequest of "all the property" of the testator.⁵ And where the rules of a mutual benefit society provide that the proceeds of the benefit certificate shall be paid to the person who is designated by the

¹ *Ripley v. Waterworth*, 7 Ves. 425. Me. 295; *Stoelker v. Thornton*, 88

² *Catholic Knights of America v. Ala.* 241, 6 S. R. 680.

Kuhm, 91 Tenn. 214 (1892), 18 S. W. R. 385; *Aveling v. Northwestern M. Me.* 295, 298; *Hamilton v. McQuillan*, A. Ass'n, 77 Mich. 7, 40 N. W. R. 28; 82 Me. 204, 19 Atl. R. 167.

Catholic Ben. Ass'n v. Priest, 46 Mich. (1881), 429; *Hamilton v. McQuillan*, 82 Me. (1889), 204, 19 Atl. R. 167; *Blouin*

v. Phaneuf, 81 Me. 178, 180, 16 Atl. R. 540; *Fox v. Senter*, 22 Atl. R. 173, 83

³ *Fox v. Senter*, 22 Atl. R. 173, 88 Me. 295, 298; *Hamilton v. McQuillan*, 82 Me. 204, 19 Atl. R. 167.

⁴ *Aveling v. Northwestern M. A. Ass'n*, *supra*.

⁵ *Weil v. Trafford*, 3 Tenn. Ch. 108, 109; *Williams v. Corson*, 2 Tenn. Ch. 269.

insured in writing, it must be paid to the person designated in his will.¹

Where the rules of the society or the conditions of the policy provide a particular method by which a change of the beneficiary may be effected, that method must be closely followed; and a change of beneficiary by any other method is invalid.² Thus, where the rules provide that a change in the beneficiary can only be made by a direction to that effect indorsed upon the policy by the person insured, properly attested by the officers of the society, and approved by the directors,³ or that a change of beneficiary is only valid upon the surrender of the policy,⁴ or on application to the secretary of the society, who shall change the name on the records,⁵ an attempt to change the beneficiary by a bequest will be ineffectual. So, too, where the policy specifically mentions to whom the proceeds shall be payable, and provides no method for designating a new beneficiary, a gift by will is void.⁶

The cases which support the rule that the insured may dispose of the proceeds of a policy upon his life, though the beneficiary is specifically mentioned in the policy, are based upon the theory that the latter, during the life of the insured, has no vested right which the law protects. The majority of the cases sustains this view, and holds that, in the absence of any special provision in the contract between the insured and the insurer, the name of the beneficiary may be changed by the former without the consent of the beneficiary and without notice to him. This would seem to be the correct view; for if the insured may, by ceasing to pay premiums, deprive the beneficiary of the proceeds of the policy altogether, why may he not do so as well while keeping the policy alive by bequeathing the proceeds to another? The interest of the beneficiary under the policy assimilates closely to the expectation of a legatee under a will.⁷ The legacy vests upon the death of the testator, but until that date it may always be revoked or adeemed. Nevertheless it must be said that there are many

¹ *Order of Mutual Companions v. Griest*, 76 Cal. 494, 18 Pac. R. 652.

² See *Hellenberg v. No. 1 of B. B.*, 94 N. Y. 580, 585, 586.

³ *Haines v. Legion of Honor*, 78 Iowa, 245.

⁴ *Holland v. Taylor*, 111 Ind. 121 (1887), 12 N. E. R. 116.

⁵ *Stevenson v. Stevenson*, 64 Iowa (1884), 534, 537.

⁶ *McClure v. Johnson*, 56 Iowa, 620.

⁷ See *ante*, § 51.

authorities which regard the right of the beneficiary as a vested right which cannot be divested without his consent. So, where the certificate provided that the proceeds of the policy shall be paid to the heirs of the testator, it was held that the insured could not bequeath it to his widow.¹ So it has been held if the insured has specifically designated the person to whom the insurance shall be paid on his death, and has reserved to himself no power of revoking such a designation, he cannot dispose of the proceeds to another by his will.²

Again, where the charter or by-laws provide that on the death of a member intestate, and without wife or child, the fund shall vest in the society, the insured has no vested interest which devolves upon his executor, but a mere power of appointment. If he does not appoint a specific beneficiary the fund will not pass under a residuary clause.³ So, where the constitution of a stock exchange provided that a sum should be paid to relatives of a deceased member as a *gratuity* from the survivors, which, under its charter, was not to be construed as an estate or interest which could be alienated, but simply as a gift to the family of the deceased, the gratuity cannot be bequeathed by the member.⁴ So, where the testator gave pecuniary legacies to be paid out of the personal estate, they cannot be paid out of the insurance money, which, under the policy, is payable to his legal representatives.⁵

§ 57. **Bequest of insurance due the testator.**—The right to recover the proceeds of an insurance policy vested in the testator, as a beneficiary under a policy on the life of another, may be bequeathed, and such interest will pass under a general or residuary clause.⁶ The same rule applies to money due under a fire insurance policy;⁷ and where a statute permits a married woman to dispose by will, during the life of her hus-

¹ Weisert v. Muehl, 81 Ky. (1883), 336, 339. See also Eadie v. Stimson, 26 N. Y. (1862), 9; Conn. Mut. L. Ins. Co. v. Burroughs, 34 Conn. (1867), 305.

² Wilmaser v. Continental L. I. Co., 66 Iowa, 417, 55 Am. R. 277; McClure v. Johnson, 56 Iowa (1881), 620; Gould v. Emmerson, 99 Mass. (1868), 154; Small v. Jose, 86 Me. 120, 124; Life

Ins. Co. v. Baldwin, 15 R. I. 106; Harley v. Heist, 86 Ind. (1882), 196.

³ Devoll v. Goodson, 79 Ky. 224, 229.

⁴ Webb v. Myers, 64 Hun, 11, 18 N. Y. S. 711. See *ante*, § 51.

⁵ Golder v. Chandler, 87 Me. 63, 65, 32 Atl. R. 784.

⁶ Small v. Jose, 86 Me. (1893), 121, 125, 29 Atl. R. 976.

⁷ Grant v. Insurance Co., 75 Me. (1884), 196, 202.

band, of a policy on his life, it was held that a will made by her, *she dying before her husband*, carried the policy to her executors, who may dispose of it free from her husband's control.¹ An indorsement on a policy by the beneficiary of the expectant benefit, made by him during the life-time of the assured, to have effect at once if assented to by the assured and the insurer, may operate to change the beneficiary at once, and transfer to the newly-named beneficiary the proceeds of the policy upon the death of the assured. The indorsement is an assignment of a future interest, valid in equity if not at law. But an indorsement by the beneficiary on the policy, disposing of her interest in it in case of her death before the insured, is testamentary, and must therefore be executed with the statutory formalities for a will.²

§ 58. **Power to devise community property.**—In several of the states of the extreme West and South the law of community property prevails in relation to property owned by man and wife. The rules of law regulating this subject were derived from the principles of the civil law which prevailed in that section of the country prior to its annexation by the United States. All property which is owned by husband and wife is either separate property or community property. The owner of separate property has the absolute power of devising it to any person whatever, free from any right or interest in the property or claim by the other party to the marriage. The right to devise community property is limited. Though the husband during his life has the legal right to exercise a complete control and supervision over the whole of it, neither party can devise more than half of it. On the death of either party to the marriage, one-half of the community property belongs absolutely to the survivor, while the other half may be disposed of by the will of the deceased. If the husband shall clearly manifest an in-

¹Harvey v. Van Cott, 25 N. Y. S. 25, 71 Hun, 394. In a state recognizing community property, it was held that an insurance policy payable to the wife, "her executors and assigns," does not pass under a bequest of her community property. The proceeds would not be payable until the death of her husband. and

consequently they would not be property acquired during the marriage. Evans v. Opperman, 13 S. W. R. 312, 76 Tex. (1890), 293, 300. See *post*, § 58, as to devises of community property.

²United Order v. Wilson (Va., 1899), 32 N. E. R. 48.

tention to devise the wife's share in the property to a stranger, and in the same will shall give to her property of his own, she must elect under the general rules and principles of election elsewhere explained in this work.¹

§ 59. Power to devise the homestead.—The homestead exemption, which by statutory regulations in many of the states is secured to the head of a family, is, in most instances, by statute, incapable of being devised by the head of the family, and consequently it will, on his death, descend to his widow or children, or to other persons who are named in the statute.² This is the general rule in most of the states which have legislated upon this subject. The occupant of the homestead has no power of devising it away from those persons on whom the law causes it to devolve, and, as a consequence, the homestead will not be included in a general or residuary devise of his estate.³

But in some states the testator may, by statute, dispose of his homestead by will in case he has no children, though it will still be subject to dower.⁴ It has also been held that a statute which forbids the *alienation* of a homestead property occupied as such by husband and wife, by either of them without the consent of the other, does not apply to a devise of the interest of either party. The court, in reaching this conclusion, reasoned that the mere *execution of a will was not an alienation*, for it did not pass any interest or title *until the death of the testator*, and that it was only *then* effectuated as an alienation, not *proprio vigore*, but by the statute of wills. So, also, as soon as the testator died, the land ceased to be occupied by him as a homestead, and neither the spirit nor the letter of the statute should prevent him from disposing of his interest which he can no longer enjoy as a homestead. His devisee would take it subject to all the rights of the other party in the homestead.⁵

¹ See § 750, *post*; *ante*, § 57.

² *Bell v. Bell*, 84 Ala. 64 (1887), 4 S. R. 189; *Scull v. Beatty*, 27 Fla. 426 (1891), 9 S. R. 4; *Pratt v. Pratt*, 161 Mass. 276. 37 N. E. R. 435; *McAlister v. Godbold* (Tex., 1898), 29 S. W. R. 417.

³ *Post*, § 751.

⁴ *Turner v. Oberheu*, 89 Wis. 1; *Purnell v. Read* (Fla.), 13 S. R. 831;

Lee v. McFarland (Tex., 1898), 46 S. W. R. 281. And he may of course devise it to his widow or children. *Barry v. Barry*, 15 Kan. (1875), 590; *Martindale v. Smith*, 31 Kan. (1884), 270, 273.

⁵ *Vining v. Wallace*, 40 Kan. 609, 613, 614. See as to election where a homestead is devised, § 751.

§ 60. The effect of the will on lands acquired after its execution — Common-law rule.— In England before the statute 1 Vict., c. 26, a will of real property was treated as a conveyance of land declaring a use in the land.¹ Its operation was restricted, both at law and in equity, to land which the testator owned at the date of its execution. And this rule was coterminous in point of time with the right to devise land, and existed, says Mr. Jarman,² as respects devises by custom as well as devises under the statutes of Henry VIII., which shows that it did not, as commonly supposed, arise from the construction of these statutes, but resulted from principles common to both species of devises.³ If, therefore, a testator devised his lands generally, or *all his lands*, or *those in a certain place*, and subsequently acquired title to other lands of which he was seized at the date of his death, the after-acquired land did not pass by the will, but descended as real estate undisposed of, to his heir. This rule was positive and independent of intention. If the testator, when making his will, held the legal title, and the equitable title was in another, and he subsequently acquired the latter, the will carried only the legal title, and the devisee took that as a trustee for the heir of the devisor. This happened where a mortgagee of the fee acquired the equity of redemption *after* the execution of a will in which he had disposed of *all his lands*. And it might happen that a testator, having purchased lands, died before taking the legal title, having prior thereto executed a will disposing of all his lands. This would not pass the legal title acquired after execution to the devisee.⁴

The testator was intestate as to the legal title, which the heir took as the trustee for the devisee in the will. Equity would compel him to execute a conveyance to the devisee. These rules, often expressly overcoming the plain intention of the testator, were productive of the greatest inconvenience and of an abundant crop of litigation. At length, by the enactment of the statute of 1 Vict., c. 26, the testator was enabled to devise all such estates in land “as he may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequent to the execution of the will.” And section 24 of the same statute provided “that every will shall

¹ 2 Black. Com., p. 378.

³ Cowper, 90.

² Ch. IV, p. 51.

⁴ See *post*, § 709.

be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."¹ Hence, a general devise of real estate in England at the present day includes all real estate owned by the testator at the date of his death, in the absence of any contrary expression of intention appearing from the language of the will itself.

§ 61. **The common-law rule in the United States as to after-acquired lands.**—The rule of the English common law in relation to the non-operative character of a will upon real property which was acquired after its execution is a part of the common law of the several states of the American Union, so far as it has not been expressly or impliedly repealed by statute.²

In many of the states where the statute does *not in express terms* provide that a general or residuary devise shall be presumed to include all the real estate of the testator belonging to him at his death, unless it shall clearly appear that he intended otherwise, the court have determined that a general or residuary devise shall carry lands acquired by the testator after the execution of the will. The Statute of Wills, 32 Henry VIII., in creating the power to devise lands, confined its operation to such interests in possession, remainder or reversion as of which he may be *seized at his death*. In the early jurisprudence of Virginia, Missouri and several other states, statutes of wills,

¹ *Ante*, §§ 14, 21.

² *Meador v. Sorsby*, 2 Ala. (1841), 712; *Patty v. Goolsby*, 51 Ark. 61, 68; *Brewster v. McCall*, 15 Conn. (1843), 274, 289; *Jones v. Shewmake*, 35 Ga. (1866), 151; *Bowen v. Johnson*, 6 Ind. (1855), 110; *Ross v. Ross*, 12 B. Mon. (51 Ky., 1851), 437, 438; *Marshall v. Porter*, 10 id. 1, 2; *McElfresh v. Schley*, 2 Gill (Md., 1843), 181; *Johns v. Doe*, 33 Md. (1848), 515; *Blaney v. Blaney*, 1 Cush. (55 Mass.) 107; *Wait v. Belding*, 24 Pick. (41 Mass.) 129; *Fay v. Winchester*, 4 Met. (45 Mass.) 513; *Hays v. Jackson*, 6 Mass. (1809), 149; *Ballard v. Carter*, 5 Pick. (Mass.) 112, 114; *George v. Green*, 13 N. H. 521, 525; *Lanning v. Cole*, 6 N. J. Eq. (1848), 102; *Den v. Brown*, 26 N. J. L. (1857), 196; *Shreve v. Shreve*, 10 N. J. Eq. (1856), 385; *McKinnon v. Thompson*, 3 Johns. Ch. (N. Y., 1818), 307; *Douglass v. Sherman*, 2 Paige (N. Y., 1831), 358; *Jackson v. Holloway*, 7 Johns. (N. Y., 1811), 394; *Vankleeck v. Church*, 20 Wend. (N. Y.) 457, 499; *Parker v. Bogardus*, 5 N. Y. 309, 311; *Philadelphia v. Davis*, 1 Whart. (Pa., 1835), 490; *Foster v. Craig*, 3 Ired. (N. C.) Law, 536; *Girard v. Philadelphia*, 4 Rawle (Pa., 1835), 323; *McGarock v. Pugsley*, 12 Heisk. (Tenn.) 689; *Gibson v. Carroll*, 13 Gratt. (Va.) 186; *Thompson v. Scott*, 1 McCord, Eq. (S. C., 1825), 32. See also cases cited, § 64.

copying substantially the phraseology of the statute of Henry VIII., were enacted. While these statutes were unrepealed and operative, and *prior* to any express statute *relating to after-acquired lands*, the courts held that the will would include after-acquired lands *if plainly evincing an intention to that effect*.¹

§ 62. The statutes conferring power to dispose of after-acquired lands — Language showing the intention of the testator under these statutes.— In every state of the Union statutes have been enacted by which a general devise of land will operate to pass lands acquired after the execution of the will, *if that shall appear to be the intention of the testator*.² Where the matter is thus placed upon the basis of the testator's intention, it is important to ascertain what language will show an intention that after-acquired lands shall pass. It has been held that a devise of "whatever I may die possessed of;"³ of "all my real estate;"⁴ of "all the estate I *now* own or possess;"⁵ "all I have or may acquire;"⁶ "all my land and personal property;"⁷ "all my property;"⁸ "all my property, wheresoever the same may be;"⁹ "the benefit of my whole estate;"¹⁰ "the property I leave behind me;"¹¹ "the balance of my property, should there be anything left;"¹² "all my right, title and interest in all my real estate;"¹³ "I want my children and my heirs to share and share alike;"¹⁴ "the residue of which I die possessed,"¹⁵ "the rest, residue and remainder," coming after a

¹ See *Hardenbergh v. Ray*, 151 U. S. 121, construing Oregon statute which permitted "every person of sound mind by last will to devise all his estate, real and personal, saving his widow her dower." See also *Liggat v. Hart*, 23 Mo. 127, 137; *Applegate v. Smith*, 31 Mo. 166, 169.

² *Ante*, § 21.

³ *Schuck v. Schuck*, 10 N. Y. S. 935.

⁴ *Briggs v. Briggs*, 69 Iowa, 617, 619, 29 N. W. R. 632.

⁵ *Haley v. Gatewood*, 74 Tex. 281, 234, 12 S. W. R. 25.

⁶ *Hall v. Audsley*, 122 Mo. 316.

⁷ *Winchester v. Forster*, 3 Cush. (57 Mass., 1849), 366, 369; *Wellborn v. Townsend*, 31 S. C. 408, 10 S. E. R. 96.

⁸ *Patty v. Goolsby*, 9 S. W. R. 846, 51 Ark. 61, 69; *Liggat v. Hart*, 23 Mo. 127.

⁹ *Peters v. Spelman*, 18 Ill. (1857), 370.

¹⁰ *Wilson v. Watson*, 4 Scam. (5 Ill.) 64.

¹¹ *Youngs v. Youngs*, 45 N. Y. 254, 257.

¹² *Webb v. Archibald*, 120 Mo. 316, 28 S. W. R. 80.

¹³ *Hardenbergh v. Ray*, 151 U. S. 112, 122, 33 Fed. R. 812.

¹⁴ *Flummerfelt v. Flummerfelt*, 57 N. J. Eq. 432, 26 Atl. R. 857.

¹⁵ *Roberts v. Roberts*, 140 Ill. 845, 349, 29 N. E. R. 886.

specific devise;¹ "all my lands in W.,"² will include after-acquired real estate.

But the following expressions have been held, under the particular language of the statutes, *not* to show an intention to pass after-acquired land: "Such estate as it has pleased God to bless me with;"³ "all my land in A."⁴ The presumption is against an intention to pass after-acquired land. The evidence of intention which will overcome this presumption must be reasonably clear and satisfactory. "If, from the will, it shall reasonably appear that the testator intended to pass after-acquired land, his intention must be observed and followed. If there is nothing in the will which favors the one deduction more than the other, lands acquired after its execution must descend as real property undisposed of."⁵

¹ *Winchester v. Forster*, 3 Cush. (57 Mass.) 366; *Cushing v. Alwyn*, 12 Met. (53 Mass.) 169; *Pray v. Watterson*, 12 Met. (Mass.) 262; *Woman's Missionary Society v. Mead*, 131 Ill. 338, 357, 23 N. E. R. 603; *Decker v. Decker*, 121 Ill. 341, 12 N. E. R. 750; *Fluke v. Fluke*, 16 N. J. Eq. 4. But in the case of *Bowen v. Johnson*, 6 Ind. 110, it was held that a presumption that the testator intended to pass after-acquired land would not arise where, after making several specific devises, he inserted a residuary clause. *Union Missionary Soc. v. Mead*, 131 Ill. 338, 357, 23 N. E. R. 603; *Fluke v. Fluke*, 16 N. J. Eq. 4.

² *In re Dickerson*, 55 Conn. 223, 10 Atl. R. 194. If the testator shall devise all his lands in a particular place and then make a residuary devise, the former will include other lands in that place which the testator may subsequently acquire. *Stevens v. Boyley*, 8 Ir. L. R. (N. S.) 410; *In re Portal*, L. R. 30 Ch. Div. 55; *Smalley v. Smalley*, 49 L. J. R. (N. S.) 662; *Dickinson v. Dickinson*, L. R. 12 Ch. Div. 22; *Dickerson's Appeal*, 55 Conn. 223, 234. *Cf. Pond v. Bergh*, 10 Paige, 140. So where the testator devised his mansion and es-

tate, called C. Court, with a devise of the residue to others, and subsequently added large tracts of land to his estate at C. Court, it was held that the testator had in mind, under the statute, his estate as it stood at the date of his death, including all lands acquired after the execution of his will. *Castle v. Fox*, L. R. 11 Eq. 542; *Webb v. Byng*, 1 K. & J. 590. See also *Walton v. Walton*, 7 J. J. Marsh. (Ky.) 58; *Warner v. Swearingen*, 4 Dana (Ky.), 195; *Paine v. Forsaith*, 84 Me. 66, 71, 24 Atl. R. 590; *Webb v. Archibald*, 122 Mo. 316; *Hall v. Audsley*, 122 Mo. 316, 26 S. W. R. 968; *Quinn v. Hardenbrook*, 54 N. Y. 83; *In re Harvey's Estate*, 80 Hun, 371, 30 N. Y. Supp. 1; *Pruden v. Pruden*, 14 Ohio St. (1863), 251; *Henderson v. Ryan*, 27 Tex. 673; *Raines v. Barker*, 13 Gratt. (Va., 1856), 128; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. R. 650; *In re Champion*, 62 Law J. Ch. 60, 67 Law Times (N. S.), 344.

³ *Dennis v. Warder*, 3 B. Mon. (43 Ky., 1842), 174.

⁴ *Pond v. Bergh*, 10 Paige (N. Y.), 140.

⁵ *Flournoy v. Flournoy*, 1 Bush (64 Ky., 1866), 523.

It is not material whether the testator had or had not in mind any particular piece of real estate which he was to acquire after the execution of his will. The theory of the statutes is, not that the will is made in anticipation of subsequently acquiring any particular piece of land, either by descent or purchase, but upon the theory that, having power to dispose of *all* he owns at his death, the testator will be presumed to intend not to die intestate as to any portion of his estate. If it appears from the will that he intended all he owned at his death to pass by it, it will pass, no matter how or from what person it may have been acquired.

In Rhode Island, under a statute¹ which provides that a testator may devise after-acquired lands, if the intention appear in express terms, such property does not pass under a will in which no reference is made to after-acquired land, though the description of the property devised is general, and a design on the part of the testator to dispose of all his property might be inferred.² And elsewhere, if the will contains no express mention of after-acquired property, and *no general or residuary devise disposing of the real estate* of the testator, real estate acquired subsequently to its execution will go to the heir.³

§ 63. Operation of a will upon an equity of redemption acquired by the mortgagee.—By the common law an equity of redemption which was acquired by the mortgagee, either by foreclosure or purchase, *after* the execution of his will, in which he disposed of his lands generally, did not pass, as the legal title was not owned by him at the date of the execution of the

¹ Pub. St. R. I., ch. 182, sec. 1.

² Webster v. Wiggin, 19 R. I. 78, 81 Atl. R. 824; In re Lorillard, 16 R. I. 254, 14 Atl. R. 920.

³ Bedell v. Fredenburgh (Minn.), 68 N. W. R. 41; McAleer v. Schneider, 2 App. D. C. 461. A statute which, in effect, makes the will speak as of the death of the testator, and causes it to carry after-acquired real estate, does not revive a specific gift which is diminished or adeemed wholly or in part. Hence, where the testator bequeaths "all my shares in the A.

Company," referring to those which he owns at the execution of his will (In re Gibson, L. R. 2 Eq. 669); or where he gives a debt due to him at the time the will is executed (Sidney v. Sidney, L. R. 17 Eq. 65), and subsequently sells the shares or receives payment of the debt, the bequests are adeemed absolutely. If then he acquires an equal number of shares in the same corporation, or a debt becomes due to him from the same person, the bequests are not revived. See *post*, § 413.

will.¹ This rule is now altered by the statutory provisions, and mortgaged land, however it may have been acquired by the mortgagee subsequent to the date of his will, will pass under a general or residuary devise.²

§ 64. **After-acquired personal property.**—The rule of the common law stated in this chapter has never been applicable to bequests of personalty. The legal presumption is that personal property, acquired after the execution of the will, passes under a bequest in general terms of all the property, or all the personal estate, or of the rest, residue and remainder of the estate of the testator.³ This presumption may be overcome by language used by the testator clearly showing an intention that after-acquired personal property shall not pass under it.⁴ Thus, where the testator gave a stranger "the remainder of the little property I own," it was held that the language of the bequest would rebut an intention to pass

¹ *Smith v. Edson*, 5 Conn. (1825), 531; *Ballard v. Carter*, 5 Pick. (Mass., 1827), 112, 114, 117; *Fay v. Winchester*, 4 Met. 515, 516; *Brigham v. Winchester*, 1 Met. (45 Mass., 1842), 390; *Lanning v. Cole*, 6 N. J. Eq. (1847), 102; *Den v. Brown*, 26 N. J. L. 196; *Webster v. Wiggins*, 19 R. I. 73, 90, 31 Atl. R. 824; *Strode v. Falkland*, 8 Ch. R. 187, 2 Vern. 624; *Yardley v. Holland*, L. R. 20 Eq. 428.

² *Wambold v. Scholl*, 12 Montg. L. R. 173.

³ *Attwood v. Beck*, 21 Ala. 590; *Gilmer v. Gilmer*, 42 Ala. 9; *Patty v. Goolsby*, 51 Ark. 61, 69; *Dickerson's Appeal*, 55 Conn. 223, 231; *Canfield v. Bostwick*, 21 Conn. 550; *Jones v. Shewmake*, 35 Ga. 151; *Curling v. Curling*, 8 Dana (Ky.), 38; *Warner v. Swearingen*, 6 Dana (36 Ky.), 195, 199; *Marshall v. Porter*, 10 B. Mon. (49 Ky.) 1, 2; *Dalrymple v. Gamble*, 68 Md. 523, 13 Atl. R. 156; *Missionary Soc. v. Mead*, 131 Mass. 338, 361; *Cushing v. Alwyn*, 12 Met. (53 Mass.) 169; *Brimmer v. Sohler*, 1 Cush. (55 Mass., 1848), 118, 133; *Haven v. Foster*, 14

Pick. (31 Mass., 1833), 534, 539; *Hays v. Jackson* (6 Mass.), 149; *Kuhn v. Webster*, 12 Gray (78 Mass., 1859), 3; *Winchester v. Foster*, 3 Cush. (57 Mass., 1849), 366, 369; *George v. Green*, 13 N. H. 521; *Lanning v. Cole*, 6 N. J. Eq. (1846), 102; *Thornal v. Force*, 29 N. J. Eq. (1878), 220; *Nichols v. Allen*, 8 Pickle (86 Tenn.), 181, 9 S. W. R. 430; *Gibson v. Carroll*, 13 Gratt. (Va.) 136; *Clements v. Kyles*, 13 Gratt. (Va.) 128; *Smith v. Edrington*, 8 Cranch (U. S.), 66; *Delacherois v. Delacherois*, 11 H. L. Cases, 62; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229; *Trinder v. Trinder*, L. R. 1 Eq. 695.

⁴ "To take the case out of the general rule . . . there must be something in the nature of the property or thing bequeathed, or in the language used by the testator in making the bequest thereof, to show that he intended to confine the gift to the property or subject of the bequest, as it existed at the time of the making of the will." *Van Vechten v. Van Vechten*, 8 Paige (N. Y.), 104.

after-acquired personal property, and that consequently a large sum of money which was due the testator from the estate of his brother who had predeceased him, but about which he knew nothing, did not pass.¹

¹ *Dunlop v. Dunlop*, 74 Me. 402, 407. But see, *contra*, *Dalrymple v. Gamble*, 68 Md. 523, 529, 18 Atl. R. 156, where the decision of the court was directly contrary on a precisely similar set of circumstances. The court pointed out the impropriety of receiving extrinsic evidence to show that testator was ignorant of the fact that a large sum of money was due him from his deceased brother's estate for the purpose of modifying the meaning of the words he had used. See also *Perry v. Hunter*, 19 R. I. 80.

CHAPTER V.

THE CAPACITY OF BENEFICIARIES TO TAKE UNDER THE WILL.

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| <p>§ 66. Devises to aliens—Their capacity to take and to hold.</p> <p>67. Right of alien devisee to recover land held adversely.</p> <p>68. Capacity of aliens to take personalty.</p> <p>69. The effect of the naturalization of an alien upon a devise to him.</p> <p>70. Statutory regulation of the power of aliens to take by devise.</p> <p>71. The validity of gifts to unincorporated communities.</p> <p>72. The capacity of corporations to take under a will.</p> <p>73. The capacity of municipal corporations.</p> <p>74. The purposes of the gift must be germane to the purposes of the corporation.</p> <p>75. The invalidity of gifts for religious purposes to municipal corporations.</p> | <p>§ 76. Testamentary gifts to municipal corporations for schools.</p> <p>77. Devises for parks and public buildings.</p> <p>78. Devises to municipal corporations for a library or museum.</p> <p>79. Municipal corporation as a trustee with power to select the objects of charitable gift.</p> <p>80. Equitable jurisdiction over municipal corporation acting as trustee.</p> <p>81. Testamentary gifts to unincorporated societies.</p> <p>82. Devises to attesting witnesses.</p> <p>83. Testamentary gifts to married women.</p> <p>84. Testamentary gifts to persons <i>non sui juris</i>.</p> |
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§ 66. Devises to aliens—Their capacity to take and hold. An alien friend always had capacity at common law to take real property by devise, though he could not take by descent.¹ This was the rule in England as early as the time of Henry II. But the alien could not hold what he had the power to take by devise as against the sovereign. His title to the land was not absolute and indefeasible in every respect. But his title was good against every one but the sovereign, and against the crown the title continued vested in the alien until it was divested in favor of the crown upon office found. So, at the present day, the right and possession are not divested in favor

¹ *Fairfax v. Hunter*, 7 Cranch (U. S.), 603, 619, 620.

of the state (in England, of the crown) until office found, or until some similar and equivalent proceeding is brought to acquire the title and possession.¹

An alien cannot take lands by descent, for the law, which does nothing in vain, will not cast a title upon a man which he has no legal power to retain as against the sovereign. But a title created by devise was regarded from a different standpoint, the title being created by the act of man, *i. e.*, the devisor, and not by the law; and the alien was in by purchase and not by descent. So also a natural-born citizen *cannot take by descent from an alien title to land which has been devised to the alien*; for, as the books say, the alien has in himself no inheritable blood. And in the case of the death of an alien to whom lands had been granted, the lands at once escheated to the crown, without any inquest or office found. But where a statute² provides that aliens may inherit from a citizen who has purchased and taken a conveyance of real estate, it has been held that an alien may inherit from one who takes land

¹ *Harley v. State*, 40 Ala. (1867), 689; *Jones v. Mimogue*, 29 Ark. (1874), 637; *Fox v. Southack*, 12 Mass. (1815), 143, 146, 147; *Scanlan v. Wright*, 15 Pick. (Mass.) 523, 530; *Foss v. Crisp*, 20 Pick. (Mass.) 122, 125; *Waugh v. Riley*, 8 Met. (Mass.) 290, 295; *Wilber v. Tobey*, 16 Pick. (Mass.) 179; *Utassey v. Geedinghausen*, 132 Me. 53, 61, 83 S. W. R. 444; *Quigley v. Birdseye*, 11 Mont. 430, 28 Pac. R. 741; *Montgomery v. Dorion*, 7 N. H. 475; *Jackson v. Beach*, 1 Johns. Cases (N. Y., 1800), 399, 401; *Sutcliff v. Forgey*, 1 Cow. (N. Y., 1823), 89; *People v. Conklin*, 2 Hill (N. Y.), 67; *Mick v. Mick*, 10 Wend. (N. Y., 1832), 379; *Wadsworth v. Wadsworth*, 12 N. Y. 376; *Marx v. McGlynn*, 88 N. Y. 357; *Vaux v. Nesbitt*, 1 McCord, Eq. (S. C., 1821), 352; *Williams v. Bennett*, 1 Tex. Civ. App. 498, 20 S. W. R. 856; *Marshall v. Conrad*, 5 Call (Va., 1798), 364; *Com. v. Selden*, 5 Muf. (Va.) 160; *Goon v. Richardson* (Wash., 1896), 47 Pac. R. 762; *Orr v. Hodgson*, 4 Wheat. (17 U. S.) 453, 461; *Gouverneur's Heirs v. Robertson*, 11 id. 332, 357; *McIlvaine v. Cox*, 2 Cranch (6 U. S., 1804), 280; *Fairfax v. Hunter*, 7 Cranch (11 U. S.), 603, 619, 620; *Craig v. Leslie*, 3 Wheat. (16 U. S.) 563; *Dawson v. Godfrey*, 4 Cranch (8 U. S.), 421; *Page's Case*, Co. 22; *Knight v. Duplessis*, 1 Keble, 174, 1 Vent. 416, 418. See also 5 Brown P. C. C. 91; Co. Lit. 2a, b; Com. Dig., Aliens, L. 2; 1 Bac. Abr. 80, 133; Cro. Car. 8. "That an alien can take by deed, and can hold until office found, must be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard for the peace of society and a desire to protect the individual from arbitrary aggression." *Gouverneur's Heirs v. Robertson*, 11 Wheat. (24 U. S., 1826), 322, p. 356.

² See Laws of New York, 1875, ch. 38.

by devise, as a title by devise is a title by purchase, within the meaning of the statute.¹

§ 67. Right of the alien devisee to recover land held adversely.—The alien, as we have seen, takes at the common law a limited title to lands devised, which is defeasible at the instance of the sovereign, or the state or commonwealth in which the land is located. Until the proper proceeding is had, he may grant or *devise the title which he has, but no more*, and his grantee or devisee takes subject to a proceeding in the nature of office found, by which *his* title and possession may be defeated. An alien to whom lands had been devised cannot, at the common law, institute and prosecute an action in ejectment to recover them, against the heir of the testator in possession; for the law, which does nothing in vain, will not lend its assistance to enable him to secure a defeasible and limited title and possession which, under its rules, he may lose at once upon the application of the attorney-general.⁴ So a non-resident alien cannot maintain a proceeding to set aside a will devising lands which are situated in a state whose legislature has provided that a non-resident alien shall not be capable of acquiring title to or taking or holding any lands by descent or devise.³

§ 68. Capacity of aliens to take personalty.—An alien takes an indefeasible title to money which is the proceeds of an estate in land devised under an imperative direction to sell. The equitable principle of conversion is applied, and the land is treated as money from the death of the testator. For, says Lord Cottenham,⁴ “the incapacity to hold land is founded upon reasons not applicable to money. The testator has given to her legatees no option to take the land; and if she had, or if the law had given the option, it would be no reason why the legatee should forfeit money which he can enjoy, because, instead thereof, he might have elected to take land which he can not enjoy.” And the rule is a general one that an alien has complete capacity to take and to hold as against all the world bequests of personal property of any and every sort.⁵

¹ *Stamm v. Bostwick*, 122 N. Y. 48, 25 N. E. R. 233.

³ *Jele v. Lemberger*, 163 Ill. (1897), 338, 342, 45 N. E. R. 279.

² *Waugh v. Riley*, 8 Met. (Mass.) 290, 295; *Fairfax v. Hunter*, 7 Cranch (11 U. S.), 603, 620; Co. Lit. 129b.

⁴ *In Du Hourmelin v. Sheldon*, 1 Beav. 79, 4 My. & Cr. 525.

⁵ *Evans' Appeal*, 51 Conn. 435. But

§ 69. The effect of the naturalization of an alien upon a devise to him.—A full, complete or exhaustive treatment of the subject of the naturalization of aliens is obviously impossible and inappropriate in a work of this character. The reader will find in the notes an enumeration of the authorities in which the subject is discussed.

It is a valid presumption of law until the contrary is shown that a *devisee is not an alien*. The burden of proof to show alienage is upon the contestant.¹ Satisfactory proof of the birth of the devisee in a foreign country of an alien father,² or proof of his nativity in this country prior to the Declaration of Independence, and of his removal from this country without having sworn allegiance to the government of the United States, is proof of alienage.³ Citizenship may be satisfactorily proved by the production of a certificate of naturalization, or by proving the birth of the devisee in this country, whether his father was or was not a citizen, or by proving this birth, whether here or in a foreign country, of a father who was, at the time of his birth, a citizen of the United States.⁴

see *Crosgrove v. Crosgrove*, 69 Conn. 416; *Greenfield v. Morrison*, 21 Iowa, 538 (1866); *Richmond v. Milne*, 17 La. Ann. 312; *Carrie's Case*, 2 Bland (Md.), 488; *Foss v. Crisp*, 20 Pick. (Mass.) 121, 126; *Harney v. Donohoe*, 97 Mo. 141; *Anstice v. Brown*, 6 Paige (N. Y.), 448; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *McGrath v. Robertson*, 1 Des. Eq. (S. C., 1795), 445; *Polk v. Ralston*, 2 Humph. (Tenn.) 337; *Craig v. Leslie*, 8 Wheat. (U. S.) 563; *Gouverneur v. Robertson*, 11 Wheat. (24 U. S., 1826), 332; *Osterman v. Baldwin*, 6 Wall. (73 U. S.) 116; *Manuel v. Wulff*, 152 U. S. 505; *Attorney-General v. Wheeden*, Park. (Eng.) 267. In so far as the incapacity of aliens to hold land is based on feudal reasons involving the imposition of unfriendly tenants upon the royal lord paramount, it would seem to have no place in the United States, where tenure is unknown and all land is allodial. But, on the contrary, the rule of the common law universally prevails wher-

ever it has not been modified or abolished by statute. And the degree in which, in recent years, land in certain sections of our country has been engrossed in the ownership of alien corporations and non-residents shows that the utility of the rule is still existent.

¹ *Gouverneur's Heirs v. Robertson*, 11 Wheat. (24 U. S., 1821), 332, 357.

² *Shanks v. Dupont*, 3 Peters (U. S.), 242, 247; *Young v. Peck*, 21 Wend. (N. Y.) 389.

³ A certificate of naturalization issued by a federal or other court having competent jurisdiction to grant it is conclusive of the naturalization of a devisee in any and every collateral proceeding in which his citizenship is in question. *United States v. Gleason*, 78 Fed. R. 396; *Ackerman v. Haenck*, 35 N. E. R. 381, 147 Ill. 514; *McCarthy v. Marsh*, 5 N. Y. 263.

⁴ *Ware v. Wisner*, 50 Fed. R. 310; *McKay v. Campbell*, 2 Sawyer, C. C. 118.

A woman who marries a citizen thereby acquires the citizenship of her husband, whether he is native born or naturalized, and if the latter, whether the marriage takes place before or after naturalization.¹

The children of aliens who become naturalized citizens, being under the age of twenty-one at the time of their parents' naturalization, are, by the federal statute, to be taken and regarded as citizens of the United States for all purposes, if, at the time of their parents' naturalization, they were residents of the United States. It is of course immaterial that they were born out of this country.² The naturalization of a person to whom land has been devised while he was an alien, effected before office found, will have a retroactive operation. It will validate the devise to him as of the date of the death of the testator, and confer an absolute and indefeasible title on him, valid against all the world.³

§ 70. Statutory regulations of the power of aliens to take by devise.—In very many of the states the common-law incapacity of aliens to hold land by devise is wholly or partly removed by statute, while in other states it is similarly confirmed.

In Alabama an alien may take and dispose of land by de-

¹ *Burton v. Burton*, 40 N. Y. 359; *Luhrs v. Eimer*, 80 N. Y. 177; *Halsey v. Beer*, 5 N. Y. Supp. 334, 335; *Wainwright v. Low*, 132 N. Y. 313, 317, 57 Hun, 383, 393; *Ware v. Wisner*, 50 Fed. R. 310; *Comitis v. Parkerson*, 56 Fed. R. 556; *Regina v. Manning*, 2 Car. & K. 886, 61 E. C. L. 886. Nor is it material that she never was a resident of this country. *Burton v. Burton*, 40 N. Y. 359. But it should be noted that the marriage of an alien woman to a citizen makes her a citizen only if she might herself legally have been naturalized. *Beck v. McGillis*, 9 Barb. (N. Y.) 35, 49; *Shanks v. Dupont*, 3 Peters (28 U. S.), 242. The purpose of the statute of February 10, 1855 (10 Statutes, 604; Rev. Stat. U. S., §§ 1993, 1994), providing that an alien woman shall gain a citizenship by her marriage to a citizen, is not to determine the gen-

eral consequences of marriage between citizens and aliens, but to encourage immigration by facilitating the naturalization of aliens. Hence it does not follow that a native-born woman loses her citizenship by marriage to an alien; and the principle that the domicile of the wife is that of the husband, his domicile in this case being abroad, does not obviate the necessity for an actual removal of the residence of the wife of an alien who is herself a citizen in order to effect her expatriation. *Comitis v. Parkerson*, 56 Fed. R. 556.

² Act of Congress of April 14, 1803, sec. 4 (2 St. U. S. 154); *State v. Andriano*, 92 Mo. 70, 4 S. W. R. 263.

³ *Jackson v. Beach*, 1 Johns. Cas. (N. Y., 1800), 390, 401; 2 Bl. Com. 249, 250; 4 id. 381, 482; Co. Lit. 8a, 129a; 1 Bacon, 130, tit. Aliens; Finch, 111.

vise,¹ while in Iowa resident aliens have the same property rights as citizens.² So in Georgia alien friends may "have the privilege of purchasing, holding and conveying real estate."³

In some of the states non-resident aliens are expressly prohibited from holding lands by purchase or descent or devise.⁴ In Iowa a non-resident alien cannot take land either by descent or devise.⁵ An alien to whom land is devised takes the same by purchase within the meaning of that word as it is employed by the legislature in a statute under the provisions of which a non-resident alien is permitted to acquire lands by purchase if certain requirements mentioned in the statute are complied with.⁶

In Colorado non-resident aliens may by statute hold lands.⁷ But the constitution of Washington prohibits an alien to take land by devise,⁸ though a will containing such a devise is not rendered wholly void thereby.⁹ Illinois¹⁰ by statute prohibits absolutely all aliens from holding land,¹¹ and from taking land by devise or otherwise, except that alien heirs may take and hold land for a period of three years,¹² within which it must be sold.

Aliens, and corporations and associations (except mining and

¹ Code, § 1914; *Nicrosi v. Phillippi*, 91 Ala. 299, 8 S. R. 561.

² Laws 1888, ch. 85; Code 1890, tit. XIII, ch. 1, § 7. So in Kentucky. Statutes 1894, §§ 334-339; *Eustache v. Rodaquest*, 11 Bush (74 Ky.), 42. California constitution (art. 1, § 17) states that "*bona fide* residents of this state shall have the same rights in respect to the acquisition, possession, enjoyment, transmission and inheritance of property as native-born citizens." Non-resident aliens, as the term is employed in code of California, signifies such persons as are neither citizens of the United States nor residents of the state. *State v. Smith*, 70 Cal. 153, 12 Pac. R. 121.

³ Code 1862, § 1661.

⁴ *Furenes v. Mickleson*, 86 Iowa, 98, 53 N. W. R. 416; Acts Gen. Ass., ch. 85, §§ 1, 2. See also *Easton v. Huott*, 95 Iowa, 473, 64 N. W. R. 408.

⁵ *Ware v. Warner*, 50 Fed. R. 310,

construing Rev. Iowa, § 2493. But compare *Furenes v. Severtsen* (Iowa), 71 N. W. R. 196.

⁶ *Doehrel v. Hillmer* (Iowa, 1897), 71 N. W. R. 204 (construing Acts 22d Gen. Assembly, ch. 85. And lands devised to a non-resident alien who is a native of Prussia will, under the treaty between the United States and Prussia, descend to the heirs of the devisees, though the heirs will, under the state law, be compelled to sell the land within a reasonable time and withdraw the proceeds from the state. *Doehrel v. Hillmer* (Iowa), 71 N. W. R. 204.

⁷ Act April 1, 1891, p. 20.

⁸ Art. 2, sec. 33.

⁹ *Brigham v. Kenyon*, 76 Fed. R. 30.

¹⁰ Act Feb. 19, 1897, p. 5.

¹¹ Act June 16, 1887, sec. 1.

¹² See *De Graff v. Went*, 164 Ill. 435, 45 N. W. R. 1075, and *Schultze v. Schultze*, 144 Ill. 290, 33 N. E. R. 201.

railroad companies) with any alien members, are prohibited from acquiring and holding real estate except for purposes of enforcing liens thereon, in Idaho.¹ In Kansas non-resident aliens are not allowed to acquire and to hold real estate; and lands already held are to revert to the state unless sold within three years, or, in case of infancy, within five years.² In South Dakota any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within the state.³ In New York 'an alien may inherit from a citizen who has purchased and taken a conveyance of land, but the law does not permit aliens to take directly as purchasers.'⁴ In Texas lands devised or descending to aliens must be disposed of within six years on penalty of forfeiture to the state.⁵ In Pennsylvania aliens may acquire title by devise.⁷ In some cases treaties have been enacted between the government of the United States and foreign governments conferring reciprocal rights and privileges upon the citizens of the respective governments as regards the ownership of real estate located within the boundaries of the other country. Such treaties are the paramount law, and, so far as they are inconsistent with the provisions of the local statute, the latter must give way.⁸

¹ Act Feb. 26, 1891.

² Act March 6, 1891, ch. —, p. 7.

³ Act Feb. 19, 1890, ch. 123, p. 233.

⁴ Laws 1809, ch. 115, as amended by Laws 1874, ch. 261, and Laws 1875, ch. 88, Laws 1889, ch. 42.

⁵ *McGillis v. McGillis*, 13 App. Div. 622, 42 N. Y. Supp. 921.

⁶ Act April 13, 1891, Gen. Laws 1891, ch. 62, p. 82. Prior to the enactment of this act aliens could take by devise in Texas, and their title was defeasible at the instance of the state alone. *Gray v. Kauffman*, 82 Tex. 65, 17 S. W. R. 513; *Pasch Dig.*, art. 48; *Baker v. Westcott*, 73 Tex. 129, 11 S. W. R. 157. A statute releasing the interest which the state has in property devised to an alien will operate to enable alien claimants, *born after its passage*, to assert their rights under it. *Van Courtland v. Nevert*, 11 N. Y. Supp. 148; *McGillis v. Van Courtland*, *id.*, 57 Hun, 590, 59 *id.* 161.

⁷ *Bright. Purdon, Dig.* 1883, Aliens;

Com. v. Detwiller, 181 Pa. St. 614. See also *Rhode Island Gen. Laws*, 1896, ch. 201, § 4; *South Carolina Gen. Stats.*, 1882, §§ 1768, 1847, 1848; *Tennessee Code*, §§ 2204-2207; *Florida Dig.*, 1881, p. 470, § 7; *Maine Rev. St.*, 1883, p. 604, § 2; *Maryland Code*, 1878, p. 392, § 8; *Michigan Const.*, 1850, art. 18, § 13; *Minnesota St.*, 1878, p. 820, § 41; *Mississippi Rev. Code*, 1880, § 1230; *Missouri Rev. St.*, 1889, § 342, by which the right of aliens to take land by devise is regulated. The statutory regulations which enable alien friends to possess real estate are strictly local to the several states which have enacted them. *State v. Smith*, 70 Cal. 153, 12 Pac. R. 121; *Code*, § 671.

⁸ *Schultze v. Schultze*, 144 Ill. 290, 297.

§ 71. **The validity of gifts to unincorporated communities.**—It was an indispensable requisite to the validity of a grant of land at the common law that the grantee should be specifically and definitely named, or that he shall be so described that he may be identified by the aid of parol evidence. It is essential to the validity of any grant of land that the grantee shall have capacity to take, either as an individual or a corporation, as well as that the grantor shall have capacity to give.¹ Hence, because a capacity to take and to enter into possession was lacking, a grant of land for charitable purposes to unincorporated societies, or to a club, or for municipal purposes to an unincorporated community, was void at common law.² These principles are strictly applied to grants of land *inter vivos*; but other considerations are not to be lost sight of, where the gift is testamentary and for charitable purposes. Wills, it must be remembered, are to be construed without very strict regard to technical rules and with the sole purpose of ascertaining the intention of the testator. They are frequently drawn by the testator himself, who, in the majority of cases, is not skilled in the use of legal phraseology. The court is bound to seek the intention of the testator. When the purpose of the will is ascertained to be the giving of a charitable gift, it must be carried out if it is legal, irrespective of the language. And if the charitable gift to a community is valid according to legal rules, and is germane to the municipal purpose, the court will apply another principle of construction, and not permit it to fail, merely because the testator has devised his property to those who are incapable of taking. If it is clear that the testator in devising his property to the inhabitants or citizens of a particular place, or to the community at large, intended to give it to the municipality as a trustee for the benefit of its citizens or inhabitants, the court will appoint the municipal corporation a trustee to carry out such intention.³ A commu-

¹ 2 Black. Com. 289.

² *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109, 138; *Jackson v. Cory*, 8 Johns. (N. Y.) 885; *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 173; *Sewall v. Cargill*, 15 Me. 414, 420; *Terrett v. Taylor*, 9 Cranch (U. S.), 43.

³ *Antones v. Eslava*, 9 Port. (Ala., 1839), 527; *Bryant v. McCandley*, 7

Ohio (1834), 135; *Cincinnati v. White's Lessees*, 6 Pet. (31 U. S.) 431; *Beatty v. Kurtz*, 2 Peters (27 U. S.), 566; *Vincennes University v. State*, 14 How. (55 U. S., 1852), 274; *Ould v. Washington Hospital*, 5 Otto (95 U. S.), 303; *Wood v. Payne*, 66 Fed. R. 807. See also *post*, § 830.

nity which, by the common law, has power to acquire, hold and manage property as a trustee for its citizens and in the capacity of a corporation aggregate, may take a legacy in trust.¹ So a board of county commissioners has power to accept a bequest for the establishment of a home for worthy homeless people and orphans under a statute permitting devises to be accepted by corporations.²

§ 72. The capacity of corporations to take under a will.—

No principle is to be found in the English common law, aside from the statutes which have been enacted to modify it, which prevents a corporation from taking lands or personal property given by will.³ It is likely that, in the earliest stages of the history of testamentary law in England, the majority of beneficiaries named in wills consisted of the numerous religious corporations, aggregate and sole, then existing, which were usually represented at the death-bed of the testator. Very early, however, in fact as early as the time of Magna Charta, the encroachment of the ecclesiastical authorities upon the rights of other classes of the community, by means of the rapid absorption into their hands of lands given or devised to them, caused the enactment of various statutes, commonly called statutes of mortmain, by which corporations were disabled from holding lands without license from the king.⁴ The statute of 34 Henry VIII., c. 5, known as the Statute of Wills, expressly excepted from its operation devises to corporations.⁵ Such devises to corporations were absolutely void, and the land descended to the heir. Subsequently, by the operation of the statute of 43 Elizabeth, and the principles surrounding the enforcement of trusts which were established and fostered by the courts of equity, where property was devised to a religious or charitable corporation for a legal and valid charitable purpose, equity would fasten a trust upon the property in the hands of the heir for the charitable purpose mentioned. For it cannot be supposed that the statute of Elizabeth, either expressly or by implication, repealed the provisions of the statute of 34 Henry VIII. forbidding de-

¹ *In re Gehrig's Estate*, 126 Mass. 587, 27 N. E. R. 784; *In re Huss*, id., reversing 8 N. Y. Supp. 750.

² *Board of Com'rs v. Dinwiddie* (Ind., 1897), 37 N. E. R. 795.

³ 10 Rep. 30; 1 Black. 478.

⁴ *Co. Lit. 2b*; *Flood's Case*, Hob. 186;

1 Eq. Ab. 95, pl. 6.

⁵ 1 Black. Com. 478.

vises to corporations. The Victorian statute of wills, by its express repeal of the statute of 34 Henry VIII., and the various modifications which have been made in the statutes of mortmain, have in England left the matter very nearly as it was at common law. Certain corporations or classes of corporations, however, are still under disability by statutes to take land by devise in England; but, as these statutes have no application in the United States, any extended commentary on them is unnecessary. In the United States of America the power of corporations to take by devise or bequest depends upon the statutes of the various states.¹

§ 73. **The capacity of municipal corporations.**—In England, in the absence of statute, a municipal corporation was authorized to hold title to freehold land, and had power in early times to take by devise.² But the statutes of wills, 32 and 34 Henry VIII., while expressly providing that devises of land to natural persons should be valid, prohibited devises to corporations, including those of a public as well as those of a private character. So far as this statute is expressly or by implication repealed in the states of the American Union, no rule of law operates to prevent a public municipal or *quasi*-municipal corporation from taking real property by devise. In an early case it was held that a statute permitting devises to "any person" validated a devise of land to a county.³

The powers and duties of American municipal corporations are conferred upon them by charter or other statute and are extremely numerous and varied. In exercising their charter powers and in carrying out the obligations which, by statute, are imposed upon them as corporations, it is, of course, necessary that they should be supplied with funds, and that they should obtain and hold both real and personal property. Two methods of raising funds are ordinarily adopted by public and municipal corporations. *First*, the ordinary method of the imposition of taxes upon the persons or property of those who are residents, or who are engaged in business within the limits

¹ See also *post*, §§ 829, 843.

² 1 Black. Com. 478.

³ *Carder v. Com'rs of Fayette Co.*, 16 Ohio St. (1865), 353, 366. In New York state a bequest for gift to a mu-

nicipal corporation is not generally valid, unless the city or town has statutory authority to hold real and personal property. *Post*, § 843.

of the municipal territory. *Secondly*, money is raised by public loans, in return for which the bonds or other obligations of the municipal corporation are issued. The power to tax and the power to borrow money and issue negotiable securities are usually conferred and defined either by the language of the charter or of the statute law of the state. But another method exists by which the municipal corporation may acquire the funds necessary to carry on its affairs. It may receive contributions in money, or conveyances of land from living persons, and bequests and devises contained in the wills of those who are deceased. In New England it was held in an early case, in the absence of statute, that a bequest of money to the inhabitants of a town, for the purpose of erecting a parsonage and to purchase lands for the support of the minister, was valid, such objects being then within the power of the town as a municipal corporation.¹ And at the present time it is provided almost universally throughout the United States, by statute, that towns, cities, counties, school districts, and other municipal and *quasi*-municipal corporations shall have power to receive legacies or devises intended for purposes which are within the scope of their statutory powers.

And it may be remarked, in passing, that if the municipal corporation has power under its charter to accept a devise of lands, which was intended to be devoted to public purposes, it is not material, as affecting the validity of the devise, that the land which is comprised in it is located beyond the territorial limits of the corporation.² And generally it is not material

¹ *Seawall v. Cargill*, 15 Me. 414, 420.

² *City of Somerville v. City of Waltham* (Mass.), 48 N. E. R. 1092; *Lester v. City of Jackson*, 69 Miss. 887 (1892), 11 S. R. 114; *Chambers v. St. Louis*, 29 Mo. 543. In the absence of express statutory provisions conferring capacity, it is possible that a devise of land to a municipal corporation might be invalid in case the land was located outside of the city limits, unless the purpose of the devise is such that it cannot be carried out unless the municipal corporation shall be permitted to own land

located outside of the city limits. In the latter case, where the purpose of the devise is germane to the municipal purpose, as where it is to provide water-works, a public park or a zoological garden, or for some other municipal purpose in which the city would not act in its public capacity as an agency of the general government and subject to its unrestricted control, but in a *quasi*-private capacity as representing the citizens of the community gathered within its territorial limits, the city may have capacity to hold land by devise out-

whether land is devised directly to the municipal corporation or to one of its officers. For, if the corporation has power under its charter to take the absolute title to land, where the devise is to the municipal officer,—as, for example, to the mayor of the city in trust for the city,—the beneficial use, title and possession will become vested at once absolutely, by virtue of the statute of uses, which is a part of the common law of this country.¹

§ 74. **The purposes of the gift must be germane to the purposes of the corporation.**—In view of the express statutory provisions which exist throughout the United States, and the very numerous cases on the subject, the validity of a charitable gift to a municipal corporation is beyond all question at this date, provided always that the character of the gift is such that its purpose can be accomplished by the municipality without violating the provisions of its charter or of any other statutory regulation. A city may carry out a charitable trust, but it must be one which is germane to the purposes and objects for which the municipal corporation was created and for which it exists.²

It would hardly be supposed by any one, though limited in his knowledge of the law, that a municipal corporation could legally act as a trustee of a private trust, however worthy the purpose of the private trust might be. No one would claim that a municipal corporation could validly execute a testamentary trust for the benefit of the widow of the testator, or for the support and education of his children, or for any other private object. No municipal corporation is under any obligation, either by charter or by any other statute, which would justify a court in compelling it to act as a private trustee. But if the trust is a charitable one, and, at the same time, it comes within

side its boundaries to the same extent as any other corporation. *Mo-Donough Will Case*, 15 How. (U. S.) 567; *Chambers v. St. Louis*, 29 Mo. 542, 574, 575; *Girard v. New Orleans*, 2 La. Ann. 897; *Concord v. Boscawen*, 17 N. H. 405, and cases cited *supra*.

¹ *Morgan v. Rogers*, 79 Fed. R. 577; *Higginson v. Turner*, 171 Mass. 586, 51 N. E. R. 172.

² *City of Quincy v. Attorney-General*, 160 Mass. (1894), 481, 457; *Fosdick v. Hempstead*, 125 N. Y. 581 (1891), 26 N. E. R. 801; *Newell v. Hancock* (N. H.), 35 Atl. R. 253; *In re Crane's Will*, 42 N. Y. Supp. 904; *Phillips v. Harrow*, 93 Iowa, 92, 101, 61 N. W. R. 434.

the scope of the municipal power, its character as a trust for public purposes will enable the court to hold that it is a trust which the municipal corporation has a right and a duty to administer. Thus, to illustrate, the widening, improvement, paving and caring for of streets and avenues;¹ the planting and adorning of them with shade trees and ornamental shrubberies; the erection of a town hall, and other public buildings;² gifts for the building of a school and the education of poor and orphan children; the establishment, erection and maintenance of public hospitals for the care of the sick; the encouragement of the practice of mechanical and other useful arts, and the distribution of fuel, soup, bread and other provisions among the necessitous,—are objects completely within the scope of municipal purposes.³ Some of the cases have gone very far in defining what a municipal purpose is. Thus it has been held that a devise of farm land, situated outside of the city limits, for the purpose of prospecting for and developing a coal mine located therein, was valid, upon the theory that obtaining an abundant supply of cheap coal, and furnishing employment for the citizens of the city, were both municipal purposes.⁴

So, too, it has been held that a city may legally act as a trustee of a fund to be devoted to purchasing and displaying, at suitable times and places, the flag of the United States.⁵ Other bequests, which have been sustained as germane to the municipal purposes, were gifts to a city or town for the purpose of purchasing a fire-engine;⁶ to the commissioners of a drainage district to enable them to improve the drainage system;⁷ to the county commissioners for the purpose of erecting a poor-house,⁸ and to a city for the erection and maintenance of a drinking fountain.⁹ Both in England and America bequests and devises, couched in general terms, but intended for the good of the city

¹ *Hamden v. Rice*, 24 Conn. 350.

² *Coggeshall v. Pelton*, 7 Johns. (N. Y., 1823) Ch. 292.

³ *Philadelphia v. Fox*, 64 Pa. St. (1870), 169.

⁴ *Delany v. City of Salina*, 34 Kan. 534, 539.

⁵ *Sargent v. Cornish*, 64 N. H. 14; *Philadelphia v. Elliott*, 3 Rawle (Pa., 1831), 170.

⁶ *Wright v. Linn*, 9 Pa. St. (1848), 433. See also *Kirk v. King*, 3 Pa. St. (1846), 436.

⁷ *Henry Co. v. Winnebago, etc.*, 53 Ill. 454.

⁸ *Board v. Rogers*, 55 Ind. 297; *Craig v. Sechrist*, 54 Ind. 419.

⁹ *In re Crane's Will*, 42 N. Y. Supp. 904.

or for the general welfare and benefit of the citizens of the town, have been upheld.¹

The tendency of public opinion as reflected by legislative action, at the present time, is undoubtedly to enlarge the scope of municipal power and to require the municipal corporation to initiate and carry on many undertakings of a public nature which would not thirty or forty years ago have been recognized as germane in any way to the municipal purposes. Thus, we have cities and towns supplying public play-grounds, recreation piers, courses of public lectures, displays of fireworks, and engaged in many similar enterprises, intended neither for the education nor the protection of their citizens, but rather for their edification and amusement. So it has been claimed that it is the duty of a municipal corporation not only to protect the persons and property of its citizens, but to provide them with remunerative labor when idle, to regulate the places where they shall carry on their callings and the time they shall devote to these avocations, as well as to supply them with amusement during their leisure hours. Upon these questions there must of necessity be a great diversity of opinion. They are not questions to be decided by the courts, but are primarily for the legislature to determine. The office of the court is simply to construe the municipal charter in order to ascertain if the purposes designated by the testator are within its scope; and while the ordinary rules of statutory construction are usually observed, the tendency is undoubtedly at the present day to extend the sphere of municipal activity, and to permit the corporation to receive gifts and bequests for purposes which are only within the terms of its charter by a most liberal construction. And where a gift to a corporation is void because the testator has designated a purpose which renders it impossible for the corporation to act as trustee, it does not follow that his good intentions are to be defeated merely because the corporation is incapable of taking a charitable devise. It is always within the jurisdiction of the

¹ Attorney-General v. Aspinall, 2 My. & Cr. 622, 623; Attorney-General v. Shrewsbury, 6 Beav. 220; Attorney-General v. Corporation of Carlisle, 2 Sim. 437; Attorney-General v. Lonsdale, 1 Sim. 105; Attorney-General v. Webster, L. R. 20 Eq. 438; Howse v. Chapman, 4 Ves. 542; Attorney-General v. Heelis, 2 Sim. & St. 67; Mitford v. Reynolds, 1 Phillimore, 185; Dolan v. McDermott, L. R. 5 Eq. 60.

court of equity to appoint a trustee if the municipality cannot act as such, and the court may also lay out a scheme to carry out the plans of the testator.¹

§ 75. **The invalidity of gifts for religious purposes to municipal corporations.**—A gift by will to a town or city, in trust for a purpose beyond the scope and foreign to the statutory power of the municipality, is invalid unless the court shall appoint a competent trustee. Thus, it is not only impossible to make such a corporation a trustee of a private testamentary trust, as, for example, of a trust to support A. for his life, but it is also impossible for such a corporation to act as a trustee for a trust which, while *valid as a charitable trust, is not within the power of the city as a public corporation*. In order to ascertain whether the provision by will is one which is for a purpose which the municipal corporation has the legal power to carry out as a trustee, the municipal charter or the statute under which the municipality has been incorporated will have to be consulted.²

In this connection it must be considered whether the municipal corporation, by virtue of its statutory power to care for and advance the general welfare of its citizens, has the power to act as a trustee of a religious trust. In the early history of New England cases occurred in which bequests to towns for the purpose of supporting missionaries or preachers of a particular denomination, or for promoting the spread of religion, were upheld.³ But at the present time, having in view existing constitutional regulations, and the present tendency of public opinion as it is reflected in the minds of judicial officers, it is extremely unlikely that a devise in trust to a city for the support of religious worship of a sectarian character would be valid. Thus, a testamentary gift to a town upon the condition that it shall support a Unitarian clergyman, and employ all income arising from the property devised in paying his salary, is void, as the town could not lawfully comply with the condi-

¹ Bullard v. Shirley, 153 Mass. 559; 109; Sloane v. McConahy, 4 Ohio Davis v. Barnstable (Mass., 1898), 28 (1829), 157.

N. E. R. 165; South New Meth. Seminary v. Peaslee, 15 N. H. 817; Farmers' ² § 74.

³ Newmarket v. Peaslee, 15 N. H. 817; Bullard v. Shirley, 153 Mass. 254, (N. Y., 1848), 618; North Hempstead v. Hempstead, 2 Wend. (N. Y., 1829), 27 N. E. R. 766.

tion named. The condition is wholly inoperative, and the money devolves upon the next of kin of the testator, under the statute.¹

While it is well settled that a municipal corporation will not be permitted to act as trustee for a fund *to be applied for the benefit of any sect in particular*, it is very probable that such a corporation has the power, in the absence of statutory prohibition, to act as a trustee in distributing a fund in aid of religious societies, *where the evident purpose of the testator was solely to improve the morals of the inhabitants of the city*. The distribution would have to be wholly non-sectarian, and for the purpose rather of advancing the moral and social activities of the religious societies than for the religious departments of their work. Certainly there is nothing inconsistent with public policy, or with constitutional principles, in the city thus employing money given to it under a will, *where no one sect is discriminated against*. The object and purposes of all existing religious societies and institutions are to improve the moral, social and material well-being of humanity, and, so far as they successfully labor in this direction, their purposes are entirely in harmony with those for which cities are incorporated.²

§ 76. Testamentary gifts to municipal corporations for schools.—That an obligation rests upon a municipal corporation to secure full opportunities to the children of its citizens for the procurement of an elementary education in free schools which are to be supported at the expense of the city is well recognized. This obligation is usually created by statute, and the means of providing money for carrying on the educational work of the city is commonly provided by taxation upon real and personal property within the municipal limits. But it is very well settled in the United States, by a long line of decisions, beginning with the Girard College Case, in the year 1844,³ that a municipal corporation has power to act as a trustee under a will which disposes of the testator's property, whether real or personal, either for the maintenance of the existing

¹ Bullard v. Shirley, 152 Mass. 254, 27 N. E. R. 766; City of Maysville v. Wood (Ky., 1898), 43 S. W. R. 408.

² Phillips v. Harrow, 93 Iowa, 92, 101.

³ Vidal v. Girard's Executors, 2 How. (43 U. S.) 127; Girard v. Philadelphia, 7 Wall (74 U. S., 1868), 1.

public school system or to found new schools, academies, colleges or other educational institutions which shall be carried on under municipal control.¹ So, also, a bequest of money for the purpose of paying the salary of teachers in the public schools of the town is undoubtedly valid.² Generally, the fact that a provision has been made by statute for the establishment and maintenance in every school district of schools at the public expense, in which a free education may be had by every child, does not, of itself, invalidate a gift to a municipality for free schools.³ And a bequest of money which is to be divided among several school districts into which a city is subdivided is not defeated by the consolidation of the several districts into one.⁴

§ 77. Devises for parks and public buildings.—A devise of land, or a bequest of money to be invested in land, to a municipal corporation for the purpose of erecting a court-house, town hall or similar public building for the use of the corporate authorities is valid, and the municipal corporation to which it is made may accept the trust if it has the power under its charter to take and own land for such purposes.⁵ But where a statute⁶ provides that a town shall have power to hold such personal

¹ *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. R. 576; *Skinner v. Harrison*, 116 Ind. 139, 18 N. E. R. 529; *Davis v. Barnstable* (Mass., 1897), 28 N. E. R. 165; *French v. Quincy*, 3 Allen (Mass.). 9; *Piper v. Moulton*, 72 Me. 155, 159; *Bangor v. Beal*, 85 Me. 129; *In re Vance* (La. Ann.), 2 S. R. 54; *In re Girard*, 2 La. Ann. 898; *Hathaway v. Sackett*, 32 Mich. 97, 100; *Tripp v. Frazier*, 4 Har. & J. (Md., 1810), 466; *Dashiell v. Attorney-General*, 5 Har. & J. (Md., 1832), 392; *Barkley v. Donnelly* (Mo., 1895), 19 S. W. R. 305; *Chambers v. St. Louis*, 29 Mo. (1860), 543; *Kelley v. Kennard*, 60 N. H. (1880), 1; *Union Cong. Soc. v. West Cong. Soc.*, 55 N. H. 463; *Le Couteulx v. Buffalo*, 33 N. Y. (1865), 333; *Jackson v. Pike*, 9 Cow. (N. Y.) 61; *Heywood v. Mayor, etc.*, 7 N. Y. 314; *Reynolds v. Commissioners*, 5 Ohio,

204; *Pickering v. Shotwell*, 10 Pa. St. 27; *Webster v. Wiggin* (R. I., 1897), 31 Atl. R. 824; *Beurhaus v. Watertown*, 94 Wis. 617, 69 N. W. R. 986; *Perin v. Cary*, 24 How. (65 U. S., 1860), 465; *Bell County v. Alexander*, 22 Tex. (1858), 350; *Castleton v. Langdon*, 19 Vt. (1846), 210; *State v. Atkinson*, 24 Vt. 448.

² *Webster v. Wiggin* (R. I., 1897), 31 Atl. R. 824, 826.

³ *In re John's Will* (Oreg.), 47 Pac. R. 341; *Green v. Blackwell*, 35 Atl. R. 375; *Attorney-General v. Eastlake*, 11 Hare, 205.

⁴ *Sheldon v. Town of Stockbridge*, 31 Atl. R. 414, 67 Vt. 299.

⁵ *Ayer v. City of Bangor*, 85 Me. 511; *Stuart v. City of Easton*, 74 Fed. R. 854; *Franklin v. Philadelphia*, 13 Pa. Co. Ct. R. 241.

⁶ 1 R. S. N. Y., p. 337, § 1.

property only as may be necessary for the exercise of corporate or administrative purposes, it has no power to accept a bequest to be devoted, under prescribed conditions, to the purchase of land and the erection of a town hall.¹ So, too, a bequest of land to be converted into personalty and employed in laying out and establishing a public park or pleasure grounds, or for improving or beautifying public grounds or parks, is valid, as carrying out a purpose consistent with corporate functions.²

§ 78. Devises to municipal corporations for a library or a museum.— A devise of land or the bequest of a fund to a municipal corporation for the purpose of founding and maintaining a free public library or reading-room for the use of its citizens and for other persons is valid, even in the absence of any express statutory provision conferring capacity upon the city to erect and maintain such institutions. For, on general principles, the establishment or maintenance of a library, reading-room or museum is not only a valid charitable gift, but one which is in every respect germane to the power and duty of the city to provide for the education of its citizens, which duty and obligation are always created by its charter or by some other statute of the state.³

§ 79. Municipal corporation as a trustee with discretionary power to select object of charitable gift.— Not only is a bequest intrusted to a municipal corporation for charitable purposes, to be expended under the direction and control of the city, valid, but the testator may devise property to a city in

¹ *In re Underhill's Will*, 6 Dem. Sur. 466, 3 N. Y. Supp. 205. Where the bequest was to erect a town hall to be *forever used as such and as offices for said town*, it was held that the town might rent out a portion of the lower floor not needed for municipal purposes. *Button v. Ely*, 46 Hun, 100.

² *Penny v. Croul*, 76 Mich. 471, 43 N. W. R. 649; *In re Bartlett*, 163 Mass. 509, 40 N. E. R. 899. For definitions of the word "park," see *State v. Schweickardt* (Mo., 1897), 19 S. W. R. 47, and *Archer v. Salinas City*, 28 Pac. R. 839, 93 Cal. 48, where a park is defined as a pleasure ground, in or near a city, set apart for the recreation of

the public; a piece of ground inclosed for the purposes of pleasure and exercise, amusement or ornament; or a place for the resort of the public for recreation, air and light; a place open for every one.

³ *Beurhaus v. Cole*, 94 Wis. 617, 629; *Dascomb v. Marston*, 80 Me. 223, 232, 13 Atl. R. 888; *Bangor v. Beal*, 85 Me. 129, 26 Atl. R. 1112; *Eastman v. Alford*, 149 Mass. 154, 21 N. E. R. 235; *Penny v. Croul*, 76 Mich. 471, 43 N. W. R. 649; *Young Men's Institute v. New Haven*, 60 Conn. 32, 23 Atl. R. 447; *In re Bartlett*, 40 N. E. R. 899, 163 Mass. 509.

trust to distribute the same, or its proceeds after sale, among several charitable institutions named by him, or among the members of a class of such institutions, the final selection of the beneficiaries, and the amount which each is to receive, being left wholly in the discretion of the municipal authorities. It is the duty of the city, if it shall accept the trust, to make a prompt and fair distribution in accordance with the intention of the testator. The general rules which are applicable to the execution of powers of distribution are applicable here.¹ If the city has power under the terms of the trust to prefer any institution, in its discretion, it cannot be compelled to make an equal division among several institutions of the same class; and no institution, though mentioned in the will, has a right to control the municipal discretion through a court of equity, provided it is exercised fairly and in accordance with the intention of the testator.² The powers of the municipality under the terms of the trust ought to be liberally construed. A bequest to a city *public library* "for the purchase of books and to defray the expenses of taking care of the municipal library" authorizes the trustees of the library to spend a portion of the bequest in the preparation and printing of a catalogue, as within their authority to take care of the library, and the possibility that the city may appropriate money for the same purpose is immaterial.³ So, generally a gift to a city in trust for charitable purposes or for public purposes, as for establishing a school or library outside of the territorial boundaries of the city, for the benefit of persons who are neither temporary nor permanent residents of the municipality, would be invalid. The powers of a municipal corporation are conferred upon it solely for the benefit of those persons who may be residents of it. Being thus specially limited in the selection of the persons for whom its public functions as a governmental agency may be brought into operation, any attempt to exercise such functions for the benefit of others is illegal and inoperative.⁴

¹ See §§ 798-807, 832.

² *New Haven Young Men's Ins. v. City of New Haven*, 60 Conn. 32, 22 Atl. R. 447.

³ *Eastman v. Allard*, 149 Mass. 154, 21 N. E. R. 235.

⁴ "Our laws are full of instances of

persons clothed with powers for certain special purposes. The loan officers of a county are a corporation; and could they, as such, receive a grant for the use of a town or of a church? Certainly not. Nor can the supervisors of Oneida county take a grant of

§ 80. **Equitable jurisdiction over municipal corporations acting as trustees.**—The general jurisdiction exercised by a court of equity over trustees of charitable trusts, to aid them when necessary, and to limit and control them in the exercise of their powers as trustees, so that the intention of the testator may be carried out, the trust property protected from waste, and the interest of the beneficiaries protected, may be exercised in the case of a charitable trust conferred upon a municipal corporation.¹ If the testator has neglected to provide any scheme for the execution of the trust by the city, a court of equity will, on proper application, provide one. And where the testator does not expressly or by necessary implication direct in what manner the municipal corporation shall carry into effect his charitable intention, the city has power to devise a scheme for the management and control of the fund devised. This is usually done by means of a statutory enactment by the state legislature creating a board of trustees or commissioners who are to control and supervise the investment and expenditure of the fund. Where, however, the city has the statutory power to accept the fund as a trustee, it may, by ordinance, appoint a board to put in operation and to control the trust created by the will. A city has the power, unless prohibited by the provisions of its charter or the statute law, to appoint agents or trustees to manage a fund devised to it for charitable purposes, and, having appointed them, it retains complete control over them and their actions. It may abolish their offices or curtail their powers by ordinance, if the municipal council shall deem it proper to do so.²

The municipal corporation which is made the trustee of a land for the use of the town of Rome. Such a grant must be deemed void upon every principle, whether we consider the special and definite objects of the corporate capacity in the board of supervisors; whether we consider the power given them by statute to take conveyances of land for the use of the county; or, lastly, whether we refer to the incapacity of all corporations to hold lands in trust for any other object than that for which the corporation was cre-

ated. Whether the court of equity would or would not prevent the trust from failing is not a question for a court of law (in an action of ejectment) to determine." By the court in *Jackson v. Hartwell*, 8 Johns. (N. Y.) 422.

¹ *Post*, § 828.

² *City of Bangor v. Beal*, 85 Me. 125, 26 Atl. R. 1112. Compare *City of Quincy v. Attorney-General*, 85 N. E. R. 1066, 160 Mass. 450.

charitable trust is, in the absence of statute, under no legal compulsion to accept the trust. If the existing statutory law imposes upon it the duty and obligation of accepting and executing the trust, it cannot refuse; but otherwise no municipal corporation can be compelled to accept and to administer property devised to it as a trustee, though it may be given for a purpose germane to its powers.¹ Having accepted the trust, the city will be held to a rigid responsibility as a trustee. If a city which is acting as a trustee shall divert the property which it holds in trust from the purposes designated by the testator, a court of equity will interfere by injunction to restrain its illegal action. And if the testator has imposed any condition in restraint of the employment of the property by the city, as he may do if he shall choose, the trust is terminated on breach of the condition, and the land is forfeited, and will revert to him, to his heirs or residuary devisee.² But the chancellor will not interfere to restrain municipal action if the diversion of property from one municipal use to another is such as would have been sanctioned had application been made for permission to the court of equity.³

§ 81. Testamentary gifts to unincorporated societies.—

By a well-known principle of common law, all grants or devises,

¹ Dailey v. New Haven, 60 Conn. 314, 22 Atl. R. 945.

² *Ante*, § 47. And where land is donated to a city, which is to exercise a specific possession and control over it—as, for example, where a cemetery was conveyed to a city in trust,—and it becomes impossible for the municipality to use it for the purpose intended, the title reverts at once, though no clause of re-entry for forfeiture of condition was contained in the deed of conveyance. *Young v. Board of Com'rs of Mahoning Co.*, 51 Fed. R. 585. See *contra*, *Sickles v. City of New Orleans*, 80 Fed. R. 868.

³ *City of Newark v. Stockton*, 44 N. J. Eq. 179, 14 Atl. R. 630. In this case the action of the municipal corporation in converting a cemetery, which had not been used for burials

for very many years, into a market, was approved and confirmed by the chancellor. *Maine R. S.*, ch. 3, §§ 51, 52, provides that a city or town may receive money in trust for benevolent, religious or educational purposes, and that "interest shall be allowed if the fund be used by the city or town, otherwise it shall be placed at interest or income, the city or town being responsible for its security." Under this statute it was held that, where no directions are contained in the will as to the mode in which the money which is bequeathed to the city shall be invested, the city may use the money for the erection of a city hall, and pay the interest on the money used to trustees for the benefit of a public library. *Ayer v. City of Bangor*, 27 Atl. R. 523, 85 Me. 511.

unless to a natural person or to a corporation capable of taking the legal title, were void for the lack of a grantee or devisee capable of taking. Under this rule devises to unincorporated societies or associations are void, except so far as they are sustained in courts of equity. If they are for a valid and legal purpose, equity will appoint a trustee to hold the legal title.¹

§ 82. **Devises to attesting witnesses.**—The subject of the incapacity of an attesting witness to take under a will to which his signature is attached is considered fully in another portion of this work.² Here it need only be said that inasmuch as the statute of frauds required that a will be attested by credible, *i. e.* competent, witnesses, and as the common law regarded as incompetent witnesses all persons who had any interest in the outcome of the action, a devise of lands was absolutely invalid if attested by a person who was a devisee under the will. As this rule always resulted in defeating the entire will, it was enacted by 25 Geo. II., c. 6, that the will should only be invalid so far as the interested witness was concerned, and that he might testify as a witness to its execution. In the United States of America the incapacity of an attesting witness to take under the will is absolute, except there be the statutory number of attesting witnesses to establish the will without his testimony.³

§ 83. **Testamentary gifts to married women.**—A married woman was under no incapacity at common law to take land or personal property under a will during coverture. But she took the property devised or bequeathed to her subject to all the rights of the husband which he possessed at the common law. But in equity it was possible to create an estate in trust for the separate use and benefit of the married woman, which would be wholly free from all control and interference of the husband during her life, and which would be wholly free from any claim of curtesy on his part at her death. Under the modern statutes, by which the property rights of a married woman are separated from the interests of her husband, she will take real or personal property devised or bequeathed to her by will, in every case, as though she were a *feme sole*.

¹ See *post*, §§ 829, 830, where the subject of devises for charitable purposes to unincorporated associations is considered fully.

² See *post*, §§ 192, 193, 205-207.

³ See *post*, § 192.

§ 84. Testamentary gifts to persons non sui juris.— Devises and legacies to infants and others *non sui juris* are valid both at common law and by statute, though because of their incapacity they have no power to indicate their acceptance. Where the acceptance of the devise or legacy will be for the benefit of an incompetent, his acceptance will be presumed. In the case of a legacy to an infant it is absolutely necessary that a general guardian shall be appointed for him, and that the legacy shall be paid to such guardian by the executor. The payment of the legacy to the parent is not sufficient.¹ The general rules and principles regulating testamentary gifts to infants are with equal reason applicable in the case of lunatics, insane persons, habitual drunkards, and other persons *non compos mentis*. The legacy must be paid to the committee of such person, to be by him invested for the benefit of the incompetent person.²

¹ Spruance v. Darlington (Del. Ch.),
30 Atl. R. 663.

² Sims v. Sims (Va., 1897), 27 S.
E. R. 436.

CHAPTER VI.

THE TESTAMENTARY CAPACITY OF THE TESTATOR.

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| <p>§ 85. Requirement of sound and disposing mind.</p> <p>86. The presumption of testamentary capacity and burden of proof.</p> <p>87. The measure of testamentary capacity required by the law.</p> <p>88. The ability to carry on ordinary business as a test of capacity.</p> <p>89. The capacity to make contracts and wills compared.</p> <p>90. The characteristics of insanity.</p> <p>91. Delusions defined.</p> <p>92. Eccentricity distinguished from delusion.</p> <p>93. The delusion to destroy capacity must influence the will.</p> <p>94. Mistake and prejudice are not insane delusions.</p> <p>95. Jealousy and suspicion are not delusions.</p> <p>96. Belief in spiritualism and witchcraft as indicating testamentary incapacity.</p> <p>97. Definition of lucid interval.</p> <p>98. The burden of proving the existence of a lucid interval.</p> <p>99. The burden of proof and the relevancy of evidence to show that the will was made in a lucid interval.</p> <p>100. Expert evidence of insanity.</p> <p>101. The qualifications of the witness as an expert, and the weight of his evidence.</p> <p>102. The testimony of non-expert witnesses to the capacity of the testator.</p> | <p>§ 103. Evidence of insanity in the family of the testator.</p> <p>104. The relevancy of evidence of the mental condition of the testator.</p> <p>105. The relevancy of an unnatural and unreasonable disposition by the testator to prove testamentary incapacity.</p> <p>106. The declarations of the testator to show testamentary capacity.</p> <p>107. The suicide of the testator as proof of insanity.</p> <p>108. Testamentary capacity of those addicted to the habitual use of intoxicating liquors.</p> <p>109. Inebriety resulting in <i>mania a potu</i>.</p> <p>109a. Permanent insanity caused by habitual drunkenness.</p> <p>110. Mode of proving that the testator was intoxicated when he made the will, or that he was an habitual drunkard.</p> <p>111. The effect of the use of morphine and similar drugs by the testator.</p> <p>112. Proof of epilepsy to disprove testamentary capacity.</p> <p>113. Testamentary capacity of idiots and imbeciles.</p> <p>114. Testamentary capacity of aged persons — Their wills regarded with favor by the law.</p> <p>115. Loss of memory caused by old age as indicating a lack of capacity.</p> |
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§ 116. Manner of decay of memory in old age.	§ 121. The testamentary capacity of married women at the common law.
117. Incapacity when arising from extreme old age.	122. The consent of the husband, when required by statute.
118. The testamentary capacity of blind persons.	123. The testamentary incapacity of convicts.
119. The testamentary capacity of deaf mutes.	124. The testamentary capacity of paralytics.
120. The testamentary capacity of infants.	

§ 85. Requirement of sound and disposing mind.—All the statutes which regulate the execution of wills require that the testator at the date of execution shall have a sound and disposing mind or memory. The words are equivalent to a requirement of the testamentary capacity which it is proposed to treat in this chapter. The difficulties of this subject are undoubtedly great, as may be ascertained upon an examination of the mass of authorities on this subject. In the opinion of the writer, the difficulty with which the subject has been and is surrounded is largely due to the fact that it is treated by the text-writers from an academic or theoretic standpoint, rather than from a practical one. The rules of law regulating the subject of testamentary capacity are at the present day well settled. In the majority of cases involving the capacity of the testator, it will be found that only questions of fact arise, and that these may be readily settled by the application of the existing rules in a reasonable and common-sense manner.

§ 86. The presumption of testamentary capacity and burden of proof.—It is a presumption of law that all men are of sound mind and able to attend to their ordinary affairs. Sanity of mind is the normal condition of most human beings, and he who would prove the contrary in any particular case must produce evidence to sustain his allegations. So, applying this principle to the probate of wills, it is the general rule, which is sustained by the majority of the cases, that all persons of the statutory age are presumed to have testamentary capacity; and it follows from this, that the party who contests the probate of a will upon the grounds of a lack of such capacity has the burden of proof to show incapacity by evidence upon that point, except in the single case where the testator is shown to have suffered from fixed insanity, not mere delirium, prior to the execution of the will.

At this point it may be of advantage to distinguish between the burden of proof, *i. e.*, the obligation to make out a *prima facie* case at the probate, and the question which side must produce a preponderance of evidence upon the question of the testamentary incapacity of the testator.

It is often said that the burden of proof to show the due execution of the will and capacity is on the proponent. By this no more is meant than that he must make out a *prima facie* case by the subscribing witnesses. He is required in the first instance to prove the due execution of the will according to the statutory formalities. Proof by the subscribing witnesses that the testator requested them to attend the execution of his will; signed it in their presence; stated it to be his will, and performed the other necessary acts of execution, and that he did this in a rational and intelligent manner, may in itself justify a presumption that he possessed testamentary capacity at the time. And the mere fact that those who are subscribing witnesses did in fact attest the will is some evidence that the testator was sane at the time, for no honest and fair man would attest the execution of a will knowing that the testator was insane.¹ During the taking of testimony of the subscribing witnesses, it is customary and highly proper, whether their testimony be taken by affidavit or deposition by the clerk, where the probate is uncontested, or *viva voce* in open court, where it is contested, to inquire of them if, in their opinion formed at the time of execution, the testator had capacity to execute his will; and if they answer that he had, their opinion thus given is of great weight, for they have been placed near the testator by the law, not only to guard him from fraud, but to ascertain whether he has capacity. Hence their testimony on the points above mentioned will be suffi-

¹In *Scribner v. Crane*, 2 Paige (N. Y.), 147, the court (Walworth, Chancellor) said: "No person is justified in putting his name as a subscribing witness unless he knows from the testator himself that he understands what he is doing. The witness should also be satisfied from his own knowledge of the state of the testator's mental capacity; that he is of sound and disposing mind

and memory. By placing his name to the instrument the witness in effect certifies to his knowledge of the mental capacity of the testator, and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness when he is dead or is out of the jurisdiction of the court."

cient alone to sustain the burden of proof which is on the proponent; and the presumption of law that every man is sane casts upon the contestant the necessity of overcoming, by the preponderance of evidence, the *prima facie* case thus made out. He must then offer affirmative evidence of testamentary incapacity, and the proponent on his part may corroborate the evidence of the subscribing witnesses by the testimony of other witnesses. The general presumption of sanity existing in the proponent's favor will control, unless upon all the evidence the proof of incapacity preponderates.¹

This is the rule which prevails in most of the states. But the American cases are not harmonious, and often the decisions of the same state are contradictory. In Michigan, Maine, Mis-

¹ *Knox v. Knox*, 95 Ala. 495, 11 S. R. 125; *Eastis v. Montgomery*, 95 Ala. 221, 11 S. R. 204; *Barnewell v. Murrell*, 108 Ala. 366, 18 S. R. 831; *Cotton v. Ulmer*, 45 Ala. 378; *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. R. 590; *Guthrie v. Price*, 23 Ark. (1860), 396; *Panaud v. Jones*, 1 Cal. (1851), 488; *Clements v. McGinn* (Cal.), 33 Pac. R. 920; *In re Barber's Estate*, 63 Conn. 393, 27 Atl. R. 973; *Chandler v. Ferris*, 1 Harr. (Del.) 454; *Dickie v. Carter*, 42 Ill. 376; *Keithley v. Stafford*, 126 Ill. (1888), 507, 18 N. E. R. 740; *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. R. 1076; *Pendlay v. Eaton*, 130 Ill. (1889), 69, 23 N. E. R. 853; *Graybeal v. Gardner*, 146 Ill. 337, 34 N. E. R. 528; *Bice v. Hall*, 120 Ill. 597, 12 N. E. R. 236; *Blough v. Perry*, 144 Ind. 463, 40 N. E. R. 70; *Rush v. Megee*, 36 Ind. 69; *Harrison v. Bishop*, 131 Ind. 161, 30 N. E. R. 1069; *In re Coffman*, 13 Iowa, 491; *Blake v. Rourke*, 74 Iowa, 519, 523, 38 N. W. R. 392; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257, 270; *Fee v. Taylor*, 33 Ky. 259; *Howat v. Howat's Ex'r* (Ky.), 41 S. W. R. 771; *Bey's Succession*, 46 La. Ann. 773; *Chandler v. Barrett*, 21 La. Ann. 58; *Higgins v. Carlton*, 28 Md. 115, 141; *Barnes v. Barnes*, 66 Me. 286; *McFadin v. Catron* (Mo., 1897), 38 S. W. R. 932; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. R. 807; *Goble v. Grant*, 3 N. J. Eq. 629; *McCoon v. Allen*, 45 N. J. Eq. (1889), 708, 17 Atl. R. 820; *Perkins v. Perkins*, 39 N. H. (1859), 163; *Pettes v. Bingham*, 10 N. H. (1839), 515; *Judge v. Stone*, 44 N. H. (1862), 593; *Hardy v. Merrill*, 56 N. H. 226, 233; *Boardman v. Woodman*, 47 N. H. 120, 132; *Jackson v. Van Duzen*, 5 Johns. (N. Y.) 144; *Jackson v. King*, 4 Cow. (N. Y., 1825), 207; *Banker v. Banker*, 63 N. Y. 409, 414; *Ean v. Snyder*, 46 Barb. (N. Y.) 230; *Jones v. Jones*, 63 Hun, 630, 17 N. Y. Supp. 905; *Dobie v. Armstrong*, 50 N. Y. S. 801; *Delafield v. Parish*, 25 N. Y. 1; *In re Burns* (N. C., 1897), 28 S. E. R. 519; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. R. 209; *Clark v. Ellis*, 9 Oreg. (1881), 128; *Grabill v. Barr*, 5 Pa. St. 441; *McPherson's Appeal* (Pa., 1887), 11 Atl. R. 205; *Thompson v. Kyner*, 65 Pa. St. 368; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Key v. Holloway*, 7 Bax. (66 Tenn., 1874), 575, 1 Am. Prob. R. 361, 362; *Robinson v. Hutchinson*, 26 Vt. 38; *Goss v. Turner*, 21 Vt. (1849), 437; *Allen v. Griffin*, 79 Wis. 529, 537, 35 N. W. R. 21; *Cole's Will*, 49 Wis. 179; *Baxter v. Abbott*, 7 Gray, 71; *Barker v. Comins*, 110 Mass. 477, 478.

souri and Vermont the courts hold that the burden of proof to show capacity is upon him who propounds the will for probate, and that it is not met by making out a *prima facie* case, but remains upon him throughout the trial. In some cases the courts which hold that the burden of proof is upon the proponent throughout, proceed upon the theory that there is a difference in the mode of proof which is required in the case of the probate of wills and that required in the case of an instrument *inter vivos*.¹

In Michigan the courts have repudiated the rule which obtains in the other states, that the proponent is required only to make out a *prima facie* case, and the rule that testamentary capacity may be inferred from due execution. In the cases decided in that state the proponent was required to prove by a preponderance of the evidence and upon the whole case that the testator possessed the capacity to make a will; and they also hold that, in the case of a contested probate, the general presumption of law that all men are of sound mind must be disregarded.² A somewhat similar rule is sustained by the cases in some other states.³

¹ *Gerrish v. Nason*, 23 Me. 438; *Cilley v. Cilley*, 84 Me. 162, 163.

² *Beaubien v. Cicotte*, 8 Mich. (1860), 9, 13; *Taff v. Hosmer*, 14 id. (1866), 309; *Kempsey v. McGuinnis*, 21 id. (1870), 123; *Aikin v. Weckerly*, 19 Mich. 482, 503; *Prentiss v. Bates*, 53 N. W. R. 153, 93 Mich. 234.

³ *Livingston's Appeal*, 63 Conn. 68, 26 Atl. R. 470; *In re Layman's Estate*, 42 N. W. R. 286, 40 Minn. 371; *Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. R. 650; *Williams v. Roberts*, 42 Vt. 658, 664. In this last case, speaking of the presumption, the court says: "If there is such a presumption, from what does it arise? Certainly it cannot arise from the fact that the great majority of mankind have sufficient capacity. The law will no more imply capacity from such a cause than it will imply that all men are white because a majority are, or that all men are dis-

honest because many are so. But it may be said that it is the duty of the persons called upon to act as witnesses to refuse to act and participate in the execution of a will, if they discover evidence of want of capacity, and that it is to be presumed they discharged their duty in this respect; and, having acted as witnesses, the law will therefore presume the capacity of the testator. Does the law ever presume that the witnesses to a will have discharged their duty in respect to its execution when proof can be obtained? It is made the duty of the witnesses to a will, by statute, to see the testator sign the will, and to sign it themselves as witnesses, in his presence, and in the presence of each other, and ordinarily there is attached to their attestation a certificate, over their signatures, that these statutory requirements have been complied with.

The presumption in favor of testamentary capacity is rebutted if it appears that the testator was insane or was under guardianship at the date of the will; or that he has been subject to permanent mental derangement, which is not merely delirium the result of intoxication or disease. The burden of proof is then upon the proponent of the will to establish, by a preponderance of the evidence, that the testator *was* sane, and had capacity at the precise date of the execution of the will. He must prove the existence of a lucid interval and the fact that the will was executed during such an interval. But where it appears from the evidence that the form of insanity from which the testator suffered was delirium which was the result of disease or intoxication, the presumption of the continuance of insanity down to the date of the execution does not arise, and the contestant is still under the necessity of showing by affirmative evidence and to the satisfaction of the court that the testator did not possess testamentary capacity at the time of execution.¹

Yet the law makes no presumption in favor of the due execution of the instrument, but requires strict proof thereof. . . . I can see no good arising from the presumption, but room for much evil. There is certainly no necessity for it, as proof on the subject is always accessible, and is presumed to be within the knowledge of the proponent's witnesses; then why not require him to prove it? It cannot have its origin in convenience, as in the case of other written instruments that are executed in the course of the ordinary daily business transactions between man and man, in which all parties participate, and which take effect upon their execution. But wills take effect only at the death of the testator. They are ordinarily executed in private, without the presence or knowledge of those who are affected by them, unless it be some one who is affected favorably; and in such case there is additional reason for caution and requiring proof."

¹See cases cited. "The question as to the *onus probandi*, where the issue is testamentary capacity, has been a great deal discussed both by judges and text-writers, and has furnished an occasion for the display of much learning and ingenuity. The numerous decisions upon the subject in this country are by no means uniform, and many of them are in direct conflict, so that any attempt to reconcile them would be hopeless. They all, however, agree upon the general proposition that sanity is presumed by law. But in some of the states it is held that the general presumption does not apply to last wills and testaments—they forming an exception to the rule,—and that therefore a party propounding a will must not only prove execution, but must also offer positive proof of capacity. A different rule, however, is recognized in most of the American courts, and it is sustained by reason and the weight of authority. If the presumption of the law is in

§ 87. **The measure of testamentary capacity required by the law.**—The statutes regulating the execution of wills invariably provide that the testator must be of a “sound and disposing mind.” It therefore becomes necessary to determine what constitutes, in law, a sound and disposing mind as regards the execution of a will. In other words, what is the measure of mental capacity which one must possess before he can validly dispose of his property by a last will and testament. The deceased, it is needless to say, need not have had a *perfect* mind. His mental powers may have been weakened by disease or diminished by old age; he may not have capacity to make a contract or to attend to the ordinary affairs of life, and yet have the testamentary power. The true rule is that if, from all the facts and circumstances considered together, it satisfactorily appears that the testator, *when making his will*, understood fully and intelligently the nature of the business in which he was engaged, comprehended generally the nature and extent of the property which constitutes his estate and which he intends to dispose of, and recollects the objects of his bounty, he has sufficient capacity to make a will.

He must recall to mind and retain in his recollection the objects of his bounty and the particulars of the property he intends to give them. And he must have intellect sufficient to grasp the general theory of the instrument he is about to execute, and to form a rational judgment of the transaction in which he is about to engage.¹

favor of sanity, we can discover no satisfactory reason why it should not be applied to wills as well as to any other instrument or writing. The argument drawn from the fact that the statute requires the testator to be ‘of sound and disposing mind,’ if a good one, would apply with equal force to the other requirements of the statute. The testator, in terms as affirmative as those in reference to capacity, is required to be of a certain age fixed by the statute. Yet no court has ever required a party propounding a will to prove the age of the testator until the question was raised upon proof by the contest-

ants. Why the one should be permitted to rest undisturbed upon the doctrine of presumption, and not the other, to say the least, does not seem to be in accordance with sound reason.” Remarks of the court in *Higgins v. Carlton*, 28 Md. 115, 141, by Judge Brent.

¹ *Bulger v. Ross*, 98 Ala. 267, 12 S. R. 803; *Burney v. Torrey*, 100 Ala. 158, 14 S. R. 685; *Dunham's Appeal*, 27 Conn. 192, 203 (1858); *Ethridge v. Bennett*, 9 Houst. (Del.) 205, 301 (1891); *Duffield v. Morris*, 2 Harr. (Del.) 379; *Cordrey v. Cordrey*, 1 Houst. (Del.) 273, 274 (1855); *Roe v. Taylor*, 45 Ill. (1867), 485; *Trish v. Newell*, 62 Ill. (1872), 196; *Yoe*

"It is essential that the testator shall have sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope or bearing of his will.

v. McCord, 74 Ill. 83; Nicewander v. Nicewander, 151 Ill. (1894), 156, 37 N. E. R. 698; Bevelot v. Lestrade, 153 Ill. 625, 632, 38 N. E. R. 1056; Campbell v. Campbell, 180 Ill. 466, 22 N. E. R. 620; Carpenter v. Calvert, 83 Ill. 62; Wallis v. Luhring, 134 Ind. 437, 34 N. E. R. 231; Lowder v. Lowder, 58 Ind. (1877), 538; Wray v. Wray, 33 Ind. (1869), 126; Durham v. Smith, 120 Ind. 463; Burkhardt v. Gladish, 123 Ind. (1889), 337; Blough v. Perry, 144 Ind. 463; Young v. Miller, 145 Ind. 652, 657; Roller v. Kling (Ind., 1898), 48 N. E. R. 948; Bates v. Bates, 27 Iowa (1868), 110, 113; In re Ames, 51 Iowa, 596, 604 (1879); Webber v. Sullivan, 58 Iowa, 260, 267, 12 N. W. R. 319; Delaney v. Salina, 34 Kan. (1885), 534, 537; Hudson v. Hughes, 56 Kan. 152, 156; Bramel v. Bramel (Ky., 1897), 39 S. W. R. 520; Howat v. Howat (Ky.), 41 S. W. R. 771; Herbert v. Long (Ky.), 23 S. W. R. 658; Reed v. Lilly (Ky., 1894), 23 S. W. R. 955; Newcomb v. Newcomb, 96 Ky. 120; Whitney v. Twombly, 136 Mass. 145, 147; Spratt v. Spratt, 76 Mich. 384 (1889), 43 N. W. R. 627; Prentiss v. Bates, 88 Mich. 567, 50 N. W. R. 637; Kempsey v. McGinnis, 21 Mich. 123, 146; Beaubien v. Cicotte, 12 Mich. (1864), 459, 480; Moriarity v. Moriarity (Mich., 1897), 65 N. W. R. 964; Smith v. Guild, 84 Me. (1852), 443; Barnes v. Barnes, 66 Me. 286; Hall v. Perry, 87 Me. 569, 572, 33 Atl. R. 160; Norton v. Paxton, 110 Mo. 456, 19 S. W. R. 807; Maddox v. Maddox, 114 Mo. 35, 21 S. W. R. 499; Couch v. Gentry, 113 Mo. 238, 20 S. W. R. 390; Farmer v. Farmer (Mo., 1897), 31 S. W. R. 926; Stoutenburgh v. Hopkins, 43 N. J. Eq. 577, 12 Atl. R. 689; In re Livingston's Will (N. J. Eq., 1897), 37 Atl. R. 770; Smith v. Smith, 48 N. J. Eq. 566 (1896), 25 Atl. R. 11; Bennett v. Bennett, 50 N. J. Eq. 439 (1892), 26 Atl. R. 593; Hampton v. Westcott, 49 N. J. Eq. 522; O'Brien v. Dwyer, 45 N. J. Eq. 689, 17 Atl. R. 777; McCoon v. Allen, 45 N. J. Eq. 708, 17 Atl. R. 820; Farnum v. Boyd (N. J., 1894), 41 Atl. R. 422; In re Lewis' Will, 30 N. Y. Supp. 675, 81 Hun, 213; In re Hall's Will, 24 N. Y. Supp. 864, 5 Misc. R. 461; In re Townsend's Will, 27 N. Y. Supp. 603, 75 Hun, 593; Ledwith v. Claffy, 45 N. Y. Supp. 612; In re Blair's Will, 16 N. Y. S. 874; In re Pike's Will, 31 N. Y. S. 689, 83 Hun, 327; Delafield v. Parish, 25 N. Y. (1812), 9; Van Guysling v. Van Kuren, 35 N. Y. (1866), 70; Tyler v. Gardiner, 35 N. Y. 359; Kinne v. Johnson, 60 Barb. (N. Y.) 69; Miller v. Oestrich, 157 Pa. St. 264; Hoope's Estate, 174 Pa. St. 373, 379; Wilson v. Mitchell, 101 Pa. St. 495; Shaver v. McCarthy, 110 Pa. St. 339, 5 Atl. R. 614; Reichenbach v. Reichenbach, 127 Pa. St. 564, 18 Atl. R. 432, 24 W. N. C. 476; In re Cardwell, 48 Leg. Int. 277, 10 Pa. Co. Ct. R. 318; Thompson v. Kyner, 65 Pa. St. 366, 378; Sharp's Appeal, 134 Pa. St. 492, 19 Atl. R. 679; Prather v. McClelland, 76 Tex. 574, 13 S. W. R. 543; Trezevant v. Rains, 85 Tex. 329, 19 S. W. R. 567; Martin v. Thayer, 16 S. E. R. 489, 37 W. Va. 38; Kerr v. Lunsford, 8 S. E. R. 403, 31 W. Va. 659; In re Blakeley's Will, 48 Wis. 294, 300; Chafin's Will, 49 Wis. 179, 182; In re Lewis, 51 Wis. 101, 105; In re Smith, 52 Wis. 543, 551; Will of Farnsworth, 63 Wis. 474, 477; Spehn v. Haubechen, 83 Wis. 313, 315; Loughney v. Loughney, 87 Wis. 92, 100-103. A statute which requires a testator to be "of sound mind and memory" does not require a perfect mind. The degree and

He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their obvious relations to each other, and to be able to form some rational judgment concerning them."¹

It is not necessary to show that he understood, as an experienced lawyer would understand, the meaning and probable effect of any or all of the provisions of his will. Nor is the artificial and complicated character of the will itself of much importance in determining whether the testator, being an unlearned man, had capacity to make it, where it appears that he employed professional assistance in preparing it.² But the character of the will must be viewed in connection with the education and situation of the testator, and is entitled to much consideration. The fact that it is a reasonable will, reasonably framed in intelligible language, and that the deceased has given due regard to the claims of kindred, ought to have much weight in determining his capacity. The situation of the testator, the amount and character of his property, and his previous habits of managing his own affairs, are to receive due consideration. The question is not so much the abstract one, *Had the testator capacity to make any will?* but had he, in view of all the circumstances as they are proved, the capacity to make *the* will which it is alleged that he did make.³ For the only period during which he must have possessed testamentary capacity is that particular portion of time during which he is executing the will. The true inquiry is to ascertain the condition of the mind of the testator at the precise time of the execution of the instrument purporting to be his will.⁴ His testamentary

amount of mental vigor which are required vary according to the circumstances of the testator's property. *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. R. 620.

¹*Delafield v. Parish*, 25 N. Y. 9; *McMaster v. Scriven*, 85 Wis. 162, 169; *In re Lewis*, 51 Wis. 101, 104; *In re Smith*, 52 Wis. 543, 552. But a majority of the cases do not require that he shall comprehend the subject per-

fectly if he has a reasonably complete understanding of it.

²If it appears from the evidence that the testator understood the general effect and operation of his will as a whole, it is immaterial that some technical terms are used in it which he did not understand. *O'Brien v. Spalding* (Ga., 1897), 81 S. E. R. 100.

³See cases cited p. 111, note 1.

⁴*In re Bull*, 2 N. Y. S. 52, 111 N. Y.

capacity at other times is not material except so far as his mental condition then may enable the court to determine his mental condition at the moment of the execution of the will.¹

§ 88. The ability to carry on ordinary business as a test of capacity.— Evidence that the testator, both before and after the execution of the will, was interested in, and able to attend to, his ordinary business, and that he conducted it properly, may be received to show his mental condition at the date of execution;² for the fact that a man has sufficient capacity to attend to his business affairs, to buy and sell property, to collect money due him, and to borrow or loan money,³ may be evidence that he has capacity to make a will. Hence, it is relevant to show that the testator had made out and signed checks in a firm hand;⁴ that he sold his business for a good price;⁵ that he had sold his lands, rented his houses, and settled his father's estate of which he had been appointed executor;⁶ that during the time that it is alleged he was unfit to execute a will the contestant had sought his advice in matters of business and had acted upon it as reliable;⁷ and generally that he had managed his property with such ability that his estate had been materially increased.⁸

It is perhaps needless to say that the mere fact that the testator delegated the active control of his business to others, while retaining the ownership and actual management of it, is not material. For though an aged testator, because of illness or physical weakness, refrains from giving active attention to the details of his business, and delegates that to others who are

624, 19 N. E. R. 503; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. R. 493; *Vance v. Upson*, 66 Tex. 476, 1 S. W. R. 179.

¹ *Craig v. Southard*, 148 Ill. 27; *Taylor v. Pegram*, 151 Ill. 106; *Von de Veld v. Judy* (Mo., 1898), 44 S. W. R. 1117; *Martin v. Thayer*, 37 W. Va. 38, 58. See also cases cited in note 1, p. 111.

² *Post*, § 89.

³ *Meeker v. Meeker*, 75 Iowa, 352, 357.

⁴ *Fluck v. Rea*, 51 N. J. Eq. 639, 22 Atl. R. 636; *Keating's Appeal*, 17 Atl. R. 207. One who for years was af-

flicted with an incurable malady, very much dissipated, and who required constant attention, but who at the same time was perfectly able to attend to his business affairs, knew the condition and value of his estate and how to dispose of it, is competent to make a will. In *re Gorkow's Estate* (Wash., 1899), 56 Pac. R. 385.

⁵ *Bannister v. Jackson*, 45 N. J. Eq. 702, 17 Atl. R. 692.

⁶ *Green's Appeal*, 140 Pa. St. 137, 21 Atl. R. 250.

⁷ In *re Skaats' Will*, 26 N. Y. S. 494, 74 Hun, 462.

⁸ In *re Ogden*, 2 N. Y. S. 345.

completely under his direction and control, he manages his business himself as actually as though he, in fact, personally attended to each detail. And he may also, because of his necessary isolation from active life, require the advice of others, and may act upon such advice in connection with his business.

Nor is it necessary to show that the testator had the actual mental capacity to engage in, and that he did in fact undertake, very extensive business transactions.¹ Neither is it required to show that he conducted his ordinary business affairs with the same amount of vigor and attention, and with the same degree of success, as formerly; for, while a diminution of mental power may be indicated by his inattention, or his want of success, yet neither of these facts, nor both, is conclusive. If he shall retain sufficient mental capacity to attend personally, or through others, to his ordinary business affairs, and to carry them on with a fair degree of success, he has testamentary capacity. His will ought to be admitted to probate unless it shall appear that, at the time of its execution, he was laboring under an insane delusion which influenced its provisions.²

§ 89. The capacity to make contracts and wills compared.

While it is the rule that a man who has the capacity to carry

¹ *Meeker v. Meeker*, 75 Iowa, 352, 357; *Bates v. Bates*, 27 Iowa, 110.

² *Tobin v. Jenkins*, 29 Ark. 151; *Coleman v. Robertson*, 17 Ala. 84, 87; *Billing's Appeal*, 49 Conn. 456; *Comstock v. Hadlyme*, 8 Conn. 254, 265; *Sturdevant's Appeal* (Conn., 1898), 42 Atl. R. 70; *Potts v. House*, 6 Ga. (1849), 324; *Schneider v. Manning*, 121 Ill. 376, 384, 13 N. E. R. 267; *Brown v. Riffin*, 94 Ill. (1880), 560, 1 Am. Pro. R. 233, 243; *Trisch v. Newell*, 63 Ill. (1871), 196; *Rutherford v. Morris*, 77 Ill. (1875), 397; *Brace v. Black*, 125 Ill. 33, 39; *Bundy v. McKnight*, 48 Ind. 502; *Harp v. Parr*, 168 Ill. 459, 469, 48 N. E. R. 459; *Slingloff v. Brunner*, 174 Ill. 561; *Bower v. Bower*, 142 Ind. 194; *Morris v. Morton* (Ky.), 20 S. W. R. 287; *Minor v. Thomas*, 12 B. Mon. (51 Ky.) 106, 108; *Higgins v. Carlton*, 28 Md. (1867), 115; *Whitney v. Twombly*, 136 Mass. 145, 147, 148; *Peninsular Trust Co. v. Barker* (Mich., 1897), 74 N. W. R. 508; *Harvey v. Sullens*, 46 Mo. 147; *McClary v. Stull*, 44 Neb. 175, 186; *Gleespin's Will*, 26 N. J. Eq. 523; *Lyons v. Van Riper*, id. 387; *Fluck v. Rea*, 51 N. J. Eq. 639, 27 Atl. R. 636; *Bannister v. Jackson*, 45 N. J. Eq. 702, 17 Atl. R. 692; *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. R. 391; *In re Skaats' Will*, 26 N. Y. S. 494, 498, 74 Hun, 462; *In re Henry's Will*, 41 N. Y. S. 1096, 1100, 18 Misc. R. 149; *In re Fricke's Will*, 19 N. Y. S. 315, 64 Hun, 639; *In re Jones' Will*, 25 N. Y. S. 109, 5 Misc. R. 199; *In re Bartholick's Will*, 5 N. Y. S. 842; *Horne v. Horne*, 9 Ired. (N. C.) 99; *In re Cameron's Estate*, 14 Pa. Co. Ct. R. 247; *Greene's Appeal*, 140 Pa. St. 137, 21 Atl. R. 250; *Keating's Appeal* (Pa., 1889), 17 Atl. R. 207; *Thompson v. Kyner*, 65 Pa. St. 368; *Holden v. Meadows*, 31 Wis. 234.

on his ordinary business has the capacity to make a will,¹ it does not follow that *one who is unable to conduct his ordinary affairs* is lacking also in testamentary capacity. The deceased may have lost his interest in or his ability to carry on the business or profession which he has followed during his life, may no longer be able to attend to the details of its practice, and may yet possess the capacity to execute a valid will disposing of his estate. The character of the business in which the deceased had been engaged and the nature and extent of the property disposed of by will ought to be considered together. Thus the fact that a will prepared by the testator himself is verbose and complicated might arouse suspicion of his capacity if the testator was an illiterate man, unused to legal phraseology, though it would appear perfectly natural if he were a lawyer of long and extensive practice. And though the character of the vocation in which the deceased had been engaged was extremely simple, the fact that he is no longer able to carry it on is not conclusive that he cannot make a will. For it is a well-settled rule, sustained by numerous cases, that it does not require the same degree of mental capacity to make a will as it does to make a contract. In other words, a man may make a will who no longer has the mental ability to make a contract.²

§ 90. The characteristics of insanity.—Insanity or unsoundness of mind assumes a vast multitude of forms. The visible

¹ *Ante*, § 88.

² *Stubbs v. Houston*, 33 Ala. 555, 566; *Coleman v. Robinson*, 17 Ala. (1849), 84, 87; *Kinne v. Kinne*, 9 Conn. 102, 105; *Gable v. Rauch* (S. C.), 27 S. E. R. 555; *Potts v. House*, 6 Ga. 324; *Green v. Green*, 33 N. E. R. 941, 943, 145 Ill. 264, 274, overruling *Keithley v. Stafford*, 18 N. E. R. 740, 126 Ill. (1888), 507; *Taylor v. Cox*, 153 Ill. 220; *Freeman v. Easley*, 117 Ill. 817; *Campbell v. Campbell*, 130 Ill. 481; *Myatt v. Walker*, 44 Ill. 485 (1867); *Brown v. Riffin*, 94 Ill. 560; *Rutherford v. Morris*, 77 Ill. 397 (1875); *Meeker v. Meeker*, 74 Iowa, 352; *Minor v. Thomas*, 12 B. Mon. (Ky.) 106; *Hathron v. King*, 8 Mass. 371; *Whitney v. Twombly*, 136 Mass. 145, 148; *Fraser*

v. Jennison, 42 Mich. 206, 233 (1879); *Rice v. Rice*, 50 Mich. 448, 455; *Prentiss v. Bates*, 88 Mich. (1891), 567, 50 N. W. R. 637; *Brinkman v. Rueggiesick*, 71 Mo. 553, 556; *Benoist v. Murrin*, 58 Mo. 307, 323; *Jackson v. Hardin*, 83 Mo. 175; *Boyd v. Eby*, 8 Watts (Pa.), 66; *Lambler v. Tryon*, 7 S. & R. (Pa.) 195; *Thompson v. Kyner*, 65 Pa. St. 368, 378; *In re Knight*, 167 Pa. St. 453, 458; *Kirkwood v. Gordon*, 7 Rich. (S. C.) L. 474, 481; *Converse v. Converse*, 21 Vt. 168 (1848); *Nicholas v. Koeschner*, 20 W. Va. (1883), 252, 258; *Kerr v. Lunsford*, 81 W. Va. 659, 8 S. E. R. 498; *Blakeley's Will*, 48 Wis. 294, 304; *Harrison v. Rowan*, 3 Wash. C. C. (1820), 585; *Stevens v. Van Cleave*, 4 Wash. C. C. 465, 467 (1825).

symptoms by which its existence is manifested are never the same. Lunacy may be found existing in every imaginable condition, ranging from the frantic and raving maniac, the liberty of whose actions must be restrained by chains or other mechanical means, to him whose ordinary actions and conversation continue both rational and intelligent, until something occurs to bring to the front the peculiar delusion by which his mind is controlled. In the case of the violently insane, it is hardly possible for the most inexperienced observer to mistake the presence of lunacy when he beholds the excitement and violence which are manifested in the conduct of the patient.

But by far the most numerous class of lunatics does not manifest insanity in this manner. The cunning of insane persons is well known. They often succeed in controlling their actions to such an extent that, to all outward appearances, they are rational; and the existence of the malady with which they are afflicted is not only successfully concealed from the non-professional observer, but from the experienced eye of the trained physician as well. Thus, the patient who entertains delusions, conducts his ordinary affairs calmly and sensibly, until, when his particular weakness is touched upon, his insanity manifests itself in its true character and in full strength and vigor.

What then are the true criterion and test of the mental unsoundness that shall vitiate a will? We cannot say that any particular actions or language invariably indicate lunacy; nor does a very marked degree of extravagance of thought or demeanor always signify that a person is insane. Much depends upon the character of the individual. Where his lunacy is to be determined, to compare his modes of speaking, of thinking and of acting, with an ideal and perfect standard, which has been erected by the imagination of the inquirer and which never existed in actuality, is a certain foundation for an erroneous inference.

The individual must be *compared with himself*. We must appeal from Phillip drunk to Phillip sober. For the existence of lunacy is not, in general, characterized so much by extravagance of thought, compared with the average and ordinary mode of thinking of all men, as by marked divergence, *without the interposition of any adequate external cause* on the part of the person whose mental condition is in question, from his

ordinary modes of speaking, thinking and acting. To go more into detail, we may ask: Has he, who was aforetime of a modest and gentlemanly demeanor, become noisy and boisterous in action, and abusive and scurrilous in speech? or has he, who once was candid, frank and generous to all, acquired the spirit of secretiveness and of chicanery in respect to those who have his best interests at heart? Does he, without adequate cause, entertain feelings of hatred towards, and a desire to inflict injury upon, the persons whom heretofore he had loved and protected? It is by these and similar tests, and not by any comparison with a mind perfectly balanced in all respects, that the insanity of the testator is to be determined.¹ For it must never be forgotten that the man who is naturally and constitutionally eccentric is never on that account necessarily insane. And, in determining the insanity of such a person, it is very evident that far different tests must be applied, and the matter viewed from a very different standpoint, than when the mental condition of one who was, by his original nature, well-balanced mentally, is to be considered.²

¹ See remarks of Dr. Ray, *Medical Jurisprudence of Insanity*, § 133.

² "In determining the mental capacity of the testator at the moment of execution, the law permits the introduction of facts and circumstances within a wide range. As the daylight wanes into twilight and thence passes away until the intense darkness of midnight is upon the earth, so the mind gradually, and often imperceptibly, passes from a condition of full strength and vigor into one of imbecility and mental eclipse. No one can affirm with any confidence at what moment testamentary capacity ceases and incapacity begins. Hence acts and declarations prior and subsequent to execution are relevant to illustrate the mental condition at that date, their evidential force depending upon the proximity to that date. And it is for the jury alone to determine when they cease to have any weight as evidence." *Canada's Appeal*, 47 Conn. 450, 459, 1

Am. Prob. Rep. 1, 9. Extract from the case of *Drew v. Clark*, 3 Add. 78, p. 87: "What is the true criterion of madness or insanity? Where is it that mere eccentricity or extravagance ends, and this begins? It may safely be assumed, at least to the present auditory, that madness subsists in every variety of shape and degree. It subsists in the maniac chained to his floor, it subsists in the patient afflicted with mental aberration on certain subjects, or on a certain subject only; and in respect of such, never betraying itself in violence or outrage. The affliction is the same in both cases, in species; the difference is only in degree. The intermediate degrees between the highest and the lowest grade of insanity are almost infinite. Patients afflicted with this terrible infirmity, in some minor degree, often conduct themselves rationally in all but certain respects; and this not in show or semblance only, but in truth and

§ 91. **Delusions defined.**—The majority of the authorities agree that, so far as the question of testamentary capacity is concerned, the *true criterion of insanity is delusions*. If the testator entertained a delusion which was, by its peculiar character, calculated to influence, and which did in fact influence, him in making the will *that he has made, he does not possess testamentary capacity*. In view of this rule, it becomes of paramount importance to define accurately what a delusion is.

A delusion, as the term is used in the law of wills, is a belief that a particular fact, or a state of facts, exists which, according to all known rules of nature, would either be impossible to exist, or, if the possibility of the fact is admitted, which does not in fact exist under the particular circumstances of the case,

substance. Instances have occurred of patients in Bedlam employed as keepers, in some sort, of their fellow madmen; they themselves being at the same time *essentially* insane. . . . Few madmen are so mad as to be incapable of some degree of self-control; and the cunning which madmen are often found to exercise if bent upon carrying some favorite point is a circumstance of the malady too well known to require any specific illustration. Instances, again, of the extraordinary power of at times concealing their infirmity, commonly inherent in madmen, are familiar to most people. Still, however, with all this, among the vulgar some are for reckoning madmen only those who are frantic and violent to some extent. . . . Others again, in the opposite extreme, are too apt to confound mere folly with frenzy, and to describe as odd, or eccentric, or in some such phrase, patients who in better judgment are actually and *essentially* insane. What, then, is the true criterion of insanity? The true criterion of the absence or presence of insanity, I take to be, the absence or presence of what, used in a *certain* sense of it, is comprisable in a single term, namely, *delusion*. Wherever the patient once conceives some-

thing extravagant to exist which still has no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being *permanently*, reasoned out of that conception, such a patient is said to be under a *delusion* in a *peculiar, half-technical* sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test, or criterion, of absent or present insanity. In short, I look upon delusion in this sense of it, and insanity, to be almost, if not altogether, convertible terms; so that a patient, under a delusion, so understood, on any subject or subjects in any degree, is for that reason essentially mad or insane on such subject or subjects in that degree. On the contrary, in the absence of any such delusion, with whatever extravagance a supposed lunatic may be justly chargeable, and how like soever to a real madman he may either speak or act on some or on all subjects, still in the absence, I repeat, of anything in the nature of *delusion* so understood as above, the *supposed* lunatic is, in my judgment, not properly or essentially insane."

and which belief is persisted in by the person who entertains it in spite of and against all argument employed to overthrow it.¹

§ 92. **Eccentricity distinguished from delusion.**—The border line which separates mere eccentricity from an insane de-

¹The definitions of an insane delusion are very numerous. In *Drew v. Clark*, 8 Add. 79, on p. 89, Sir John Nicholl defines a delusion "as a belief of facts which no rational person would have believed." This is simply begging the question, for it assumes at the outset that the testator is not a rational person. Lord Brougham's definition in *Waring v. Waring*, 6 Thornton's Notes, 388, "a belief in things as realities which exist only in the imagination of the patient," is too broad and inclusive, for, if it means merely that an insane delusion is a figment of the imagination, then all the imagery of poet, orator and painter are insane delusions. The element omitted from these definitions is the fact that the person laboring under the delusion *persists in believing in it against what would be to a person mentally well balanced the most convincing proof of the falsity of such belief*. "An insane delusion," says the court in the recent case of *Kimberly's Appeal* (Conn., 1897), 36 Atl. R. 847, "is a false belief for which there is no reasonable foundation, and which would be incredible under the given circumstances to the same person if of sound mind, and concerning which the mind of the decedent was not open to permanent correction . . . through evidence or argument." And in the case of *Seamen's Friend Soc. v. Hopper*, 33 N. Y. 624, Denio, J., said: "If a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their exist-

ence, he is, so far as they are concerned, under a morbid delusion, and delusion in that sense is insanity." Approved in *Haines v. Hayden*, 54 N. W. R. 911, 95 Mich. 332. "Whenever the patient once conceives something extravagant to exist, which still has no existence whatever but in his own heated imagination; and whenever, at the same time, having so conceived, he is incapable of being, or at least of being permanently, reasoned out of the conception," etc. *Drew v. Clark*, 8 Add. 79. "According to the definitions, it is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind, that can be regarded as furnishing evidence that his mind is diseased or unsound; in other words, that he is subject to insane delusions. If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence, believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder. Delusions of that kind can be accounted for upon no reasonable theory except that they are the creations of the mind in which they originate." By Van Vleet, Vice-Ordinary, in *Middleditch v. Williams*, 45 N. J. Eq. 726.

In this connection it may be well to quote at length the learned opinion of Chief Justice Cockburn delivered in the case of *Banks v. Goodfellow*, L. R. 5 Q. B. 549, on page 570: "It is said, indeed, by those who insist that any degree of mental unsoundness

lusion which destroys testamentary capacity is more or less distinguishable according to the circumstances of the case. It must never be forgotten that eccentricity and extravagance of

suffices to take away testamentary capacity, that where an insane delusion has shown itself, it is always possible, and indeed may be assumed to be probable, that a greater degree of mental unsoundness exists than has actually become manifest. But this view, which is by no means universally admitted, is unsupported by proof, and must be looked upon as matter of speculative opinion. It seems unreasonable to deny testamentary capacity on the speculative possibility of unsoundness which has failed to display itself, and which, if existing in a latent and undiscovered form, would be little likely to have any influence on the disposition of the will. No doubt, where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. Where insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made in such circumstances becomes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded. But where in the result a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have no effect upon the will, we

see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. Such an inquiry may involve, it is true, considerable difficulty, and require much nicety of discrimination, but we see no reason to think that it is beyond the power of judicial investigation and decision, or may not be disposed of by a jury directed and guided by a judge. In the case before us two delusions disturbed the mind of the testator: the one that he was pursued by spirits, the other that a man long since dead came personally to molest him. Neither of these delusions—the dead man not having been in any way connected with him—had, or could have, any influence upon him in disposing of his property. The will, though in one sense an idle one, inasmuch as the object of his bounty was his heir-at-law, and therefore would have taken the property without its being devised to him, was yet rational in this: that it was made in favor of a niece who lived with him and who was the object of his affection and regard. And we must take on the finding of the jury, that, irrespectively of the question of these dormant delusions, the testator was in possession of his faculties when the will was made. Under the circumstances we see no ground for holding the will to be invalid. If, indeed, it had been possible to connect the dispositions of the will with the delusions of the testator, the form in which the case was left to the jury might have been open to exception. It may be, as has been contended on the part of the plaintiff, that in a case of unsoundness, founded on de-

thought, speech and action are not *alone* insanity.¹ A will is not to be set aside simply because the maker of it acted in a way which most people would characterize as utterly absurd or foolish and eccentric, or because he was foolish or ignorant, or because he did not possess average mental capacity. Men who are admittedly sane do not act alike under the same circumstances. Some are at all times exceedingly cool, thoughtful and methodical in their ways of acting and their modes of speaking; others are rash and impulsive in action, ready of tongue, and quick to jump to conclusions.

In some men the propensity to do absurd things, things which, viewed from the standpoint of the average man, are very foolish, is inherent; others, owing to some natural bias, always conduct themselves rationally, and say and do nothing that in any way seems out of the ordinary. A great deal also depends upon early training and the sort of experience the individual has had. We are, to a large extent, the creatures of habit, and our habits are almost wholly the result of our association with others. They have their beginning in childhood or youth, and as we mature they grow with us and fasten themselves upon us until, when we have attained years of maturity, they have become a part of ourselves. That a man, by reason of his constant association with eccentric persons, should at last become eccentric himself and extravagant in his conduct, is by no means incredible. No one, knowing the man and his previous life, will mistake his eccentricity for insanity. But a stranger, on seeing him for the first time and not knowing anything of his past career, may well entertain a suspicion that all is not right with him mentally.

It is always relevant to prove that the testator was eccentric in his conduct before and after the execution of the will at periods not too remote. The court should be placed in possession of every particle of evidence that will in the slightest de-

lusion, but which delusion was not manifested at the time of making the will, it is a question for the jury whether the delusion was not latent in the mind of the testator. But, then, for the reasons we have given in the course of this judgment, we are of the opinion that a jury should be told that the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it was such as was calculated to influence the testator in making it."

¹See *post*, §§ 95, 96.

gree enable it to determine his capacity. Evidence that on various occasions the testator was extravagant, eccentric and excited in his conduct, and rambling, incoherent and disconnected in his conversation and ideas; that he acted absurdly in public or in private; that he entertained peculiar views upon political or religious subjects;¹ that he was unduly generous with his property or unduly parsimonious, is always relevant. But the importance and weight of any of these facts as evidence depend upon the circumstances of the whole case, and whether the peculiar characteristic indicates or influences a delusion which produces, or aids in producing, the will is an open question. Proof of any one of them alone is of slight value; proof of all of them will not raise a presumption of insanity, unless, from the proof, in connection with *all* the evidence, it shall appear to the satisfaction of the court that the testator had not sufficient mind and memory to make a will and was under the influence of the insane delusion.²

Mere eccentricity is usually of slow and gradual growth. In this respect it differs from permanent insanity, the result of some change in the brain of the man himself. That an individual of mature years should undergo a sudden and marked change of disposition, and that he should suddenly acquire eccentric and peculiar habits of talking and acting totally at variance with those of his previous life, without any apparent or outwardly visible cause, are circumstances calculated to create a suspicion of his mental soundness. If one who has been

¹ *Post*, § 96.

² *Hutchinson v. Hutchinson*, 152 Ill. 347, 352, 38 N. E. R. 926, 50 Ill. App. (1892), 87; *Brace v. Black*, 125 Ill. 33, 39, 17 N. E. R. 66; *Schneider v. Manning*, 121 Ill. (1897), 376, 386; *Bennett v. Hibbert*, 88 Iowa, 153, 162, 53 N. W. R. 93; *Bates v. Bates*, 27 Iowa, 110, 113, 1 Am. Pro. R. 260; *Brown v. Ward*, 53 Md. 576 (1880); *Barnes v. Barnes*, 66 Me. 286; *Hall v. Perry*, 87 Me. 560, 575, 33 Atl. R. 160; *Whitney v. Twombly*, 136 Mass. 145, 148; *Fraser v. Jennison*, 42 Mich. 206, 230; *Prentiss v. Bates*, 88 Mich. 567, 93 Mich. 234, 239, 50 N. W. R. 637; *Rice v. Rice*, 50 Mich. 448, 455 (1893); *Farnum v. Boyd* (N. J., 1898), 41 Atl. R. 422; *McClary v. Stull*, 44 Neb. 175, 189, 62 N. W. R. 501; *Henry's Will*, 41 N. Y. S. 1096; *Coit v. Patchen*, 77 N. Y. (1879), 533; *Brick v. Brick*, 66 N. Y. 144; *In re McPherson's Will*, 4 N. Y. Supp. 181, 182, 1 Con. Sur. 223; *In re Ramsdell*, 3 N. Y. Supp. 499, 500, 51 Hun, 636; *In re Mabie's Will*, 5 Misc. R. 179, 24 N. Y. S. 855, 861; *In re Merriam's Will*, 16 N. Y. 738; *Ulmer's Appeal* (Pa., 1888), 12 Atl. R. 686; *In re Knight's Estate*, 167 Pa. St. 453, 458, 31 Atl. R. 682; *Blakely's Will*, 48 Wis. 294, 304; *Chafin's Case*, 32 Wis. 558.

upright and honest in his business dealings suddenly becomes tricky and dishonest; if a person who has always been chaste becomes licentious; or if one who has always been generous and open-handed suddenly develops a parsimonious disposition without an apparent reason, it may be an indication that his mind is impaired.¹ And the sudden and unexpected alteration of conduct and disposition may be the beginning of an insane delusion, which, if it increases, may so becloud the intellect as to destroy testamentary capacity. But mere wickedness alone is never insanity. Hence the fact that a man is proved to have been licentious, or tricky and mendacious, is no proof whatever that he is insane, or lacking in testamentary capacity,² unless the change in disposition is sudden and unaccounted for, as pointed out above.

A peculiar distinction may be noticed by an observant person to exist between him who is afflicted with an insane delusion and the man who is merely eccentric. The former believes implicitly in his particular hallucination and cannot be argued out of it. He fails to notice its absurdity, and is surprised that other persons to whom he unbosoms himself do not agree with him in his peculiar views. *He* does not observe any error or any singularity in his belief, and is astonished, annoyed, and often enraged, when others do. He has the utmost and fullest reliance upon the accuracy of the reasoning by which he has reached what seems to others an absurd conclusion; and is readily offended if those with whom he discusses the subject regard it with the ridicule or contempt that it may deserve to receive at the hands of sensible and reasonable persons.

On the other hand, the man who is merely eccentric often takes a peculiar pride in his eccentricity. He admits that his language and conduct are extraordinary and that he does not act like the majority, and rather glories in the fact. He is usually a man of marked individuality, with a strong, not to say an obstinate, will, entertaining fixed opinions on most subjects. In the majority of cases his strange actions, peculiar habits and extraordinary language are the outcome of his keen

¹ *Lucas v. Parson*, 27 Ga. 593; *In re Clark's Will*, 25 N. Y. S. 712, 5 Misc. R. 68. St. 564, 24 W. N. C. 476, 18 Atl. R. 432; *In re Jones' Will*, 25 N. Y. S. 109, 5 Misc. R. 199; *Carpenter v. Bailey*, 94

² *Reichenbach v. Ruddach*, 127 Pa. Cal. 406, 29 Pac. R. 1101.

sense of humor and whimsical disposition, tempered by a contempt for the opinions of others, and prompted by a desire for notoriety, which he finds he cannot secure by other means.

§ 93. The delusion to destroy capacity must influence the will.—The fact that the testator at the time of making his will was under an insane delusion is immaterial if the delusion did not influence the provisions of the will. The inquiry of the court need not be directed to ascertain whether the belief of the testator was justified by the facts, unless it shall appear that his belief produced his will. For unless the testamentary disposition, or a part of it, is affected by the delusion of the testator so that the will is wholly or in part the result of the delusion, the will should be admitted to probate. If the delusion neither influenced the testator nor was calculated to influence him in framing his will, it cannot be considered to have destroyed his testamentary capacity.¹

¹Cotton v. Ulmer, 45 Ala. 378, 397 (1871); Florey v. Florey, 24 Ala. 241; In re Redfield's Estate (Cal., 1898), 48 Pac. R. 794; Dunham's Appeal, 27 Conn. 192, 203; Gardner v. Lamback, 47 Ga. 133 (1872); Wilcoxon v. Wilcoxon, 165 Ill. 454, 458, 46 N. E. R. 369; Young v. Miller, 145 Ind. 652, 659, 44 N. E. R. 757; Blough v. Parry, 144 Ind. 463, 40 N. E. R. 70; Burkart v. Gladish, 123 Ind. 337; Hite v. Sims, 94 Ind. (1883), 333; Schildknecht v. Rompf (Ky.), 4 S. W. R. 235; Hoskins v. Hoskins (Ky.), 7 S. W. R. 546; Kingsbury v. Whittaker, 32 La. Ann. (1880), 1055; Brown v. Ward, 53 Md. 376, 389; Benoist v. Murrin, 58 Mo. (1874), 307, 328; Maynard v. Tyler (Mass., 1898), 46 N. E. R. 413; Fraser v. Jennison, 42 Mich. 206, 208; Haines v. Hayden, 95 Mich. 832, 54 N. W. R. 911; Sharp v. Merriman (Mich.), 66 N. W. R. 372; Peninsular Co. v. Barker (Mich., 1898), 74 N. W. R. 509; Rice v. Rice, 50 Mich. 448; McClary v. Stull, 44 Neb. 175, 62 N. W. R. 501; Stackhouse v. Horton, 15 N. J. Eq. 202; Middleditch v. Williams, 45 N. J. Eq. 726 (1889), 17 Atl. R. 826; Van Guyaling v. Van Keuren, 35 N. Y. 70, 74; Potter v. McAlpine, 3 Dem. Sur. 108, 122; Lothrop v. American Board, 67 Barb. (N. Y.) 590, 595; Stanton v. Weatherwax, 16 Barb. 259; Shaw's Will, 2 Redf. (N. Y.) 107; Coit v. Patchen, 77 N. Y. 533; Calhoun v. Jones, 2 Redf. 34; In re Davis, 91 Hun, 209; In re Weil, 1 N. Y. S. 91, 48 Hun, 621; In re Lapham's Will, 44 N. Y. S. 90; Potter v. Jones, 20 Oreg. 230, 25 Pac. R. 769; In re Trich, 165 Pa. St. 586, 604, 30 Atl. R. 1053; In re Boyer's Estate, 166 Pa. St. 630, 632, 31 Atl. R. 859; Shreiner v. Shreiner (Pa. St., 1899), 35 Atl. R. 974; Thomas v. Carter, 33 Atl. R. 81, 170 Pa. St. 272, 283; Denson v. Beasley, 34 Tex. 191; Manley's Ex'r v. Staples, 65 Vt. 370, 374, 26 Atl. R. 630; Cole's Will, 49 Wis. (1880), 179, 182; Ballantine v. Proudfoot, 62 Wis. 216, 220-222. Where the testator, during the last years of his life, stated that his children and his wife were persecuting him in various ways, that they had conspired to put him in an asylum for the insane, and that they had prompted children on the streets to call after him, all of which statements were untrue, and persists

§ 94. **Mistake and prejudice are not insane delusions.**—A mistake of fact entertained by the testator as to the character and motives of a person who is his heir, which prompts and leads him to disinherit that person, or a strong and perhaps unreasonable prejudice against a person, is not *alone* an insane delusion destroying testamentary capacity.¹ Thus the fact that the testator believed that his relatives have ill-treated him,² or that they are inimical to him and have conspired to defraud him,³ and for that reason leaves his property to strangers, does not constitute an insane delusion, unless it appears that his belief was wholly without *any basis whatever*, and that the testator *obstinately persisted in it against all argument* which may have been employed to dissuade him. If there are any facts, however little evidential force they may possess, upon which the testator may in reason have based his belief, it will not be an insane delusion, though on a consideration of the facts themselves his belief may *seem* illogical and foundationless to the court; for a will, it is obvious, is not to be overturned merely because the testator has not reasoned correctly.

A mistaken estimate of a person's character is not necessarily an insane delusion. The fact that the testator thinks his heir is dissipated in his conduct, wasteful in his expenditures, and ill-fitted to care for the heritage which would be his if the testator should die intestate, is not of necessity a delusion. Whether a person is wasteful in his expenditures and profligate in his life is largely a matter of opinion depending upon early training and surrounding circumstances. The fact that an aged testator, who, in the course of the process of accumulating a large fortune, has acquired habits of close economy, bordering perhaps

in his statements after he had once admitted that his suspicions were unfounded, refusing also to eat with his family, alleging that they had conspired to poison him, and finally killed his wife and committed suicide, a very striking case of insane delusion is made out and the will is void. *In re Kahn's Will*, 1 Con. Sur. 510, 5 N. Y. S. 556.

¹ *Carpenter v. Calvert*, 88 Ill. 62 (1876); *Higgins v. Carlton*, 28 Md. 115 (1867); *Barnes v. Barnes*, 66 Me. 286.

² *In re Ruffino* (Cal., 1898), 48 Pac. R. 127; *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. R. 1101; *Boardman v. Woodman*, 47 N. H. 120, 137.

³ *Kimberly's Appeal* (Conn., 1898), 36 Atl. R. 847; *In re O'Dea's Estate*, 84 Hun, 591, 33 N. Y. Supp. 463; *In re Fricke's Will*, 19 N. Y. Supp. 315; *Clapp v. Fullerton*, 84 N. Y. 190; *Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. R. 826; *Trumbull v. Gibbons*, 22 N. J. L. (1849), 117.

upon penuriousness, regards with disfavor habits of more liberal expenditure upon the part of his children, who, surrounded by affluence and accustomed to a luxurious mode of living, have never experienced the need of money, nor realized how difficult it is to acquire, does not necessarily prove him insane in case he leaves a larger share of his property to some of his children than to others.

So, too, it has been held the fact that a testator, thinking his son has stolen a former will, proceeds to execute a will wholly disinheriting him, is not an insane delusion, where it appeared the will in question was in fact missing and that the son had had the opportunity to purloin it.¹ If some facts exist from which the testator has drawn an incorrect inference or estimate of character, it cannot be called an insane delusion, however illogical or absurd it may seem. But if the belief that a person had a bad moral character is wholly without any foundation in fact, and is persisted in against all argument, it is an insane delusion.²

§ 95. Jealousy and suspicion are not delusions.—The belief of an extremely jealous man that his wife has been unfaithful to him, and that the children of which she is the mother have been begotten on her by other men, though it may be based upon the flimsiest evidence, is not necessarily an insane delusion. Even where it is conclusively shown that the wife possesses a spotless character, and the only evidence on which the husband bases his belief in her unchastity consists of facts which are perfectly innocent in their bearing, it is not an insane delusion, as this term is used in connection with capacity, for it is not the outcome of pure fancy arising spontaneously in his mind. It is an error, a mistaken estimate of character, arising from an ill-regulated judgment, or it is the outcome of his jealous disposition. For the jealous man is, it is well known, disposed to magnify any act, perhaps a glance, some jocose or inadvertent remark, or some other insignificant incident con-

¹ *Martin v. Thayer*, 16 S. E. R. 480, 87 W. Va. 38.

² If a parent seems to have been influenced in making provision for a child by a belief that he is extravagant and unfitted to care for his

property, and on that account gives him less than others, it is always proper to receive any evidence that will tend to show that the belief was well founded. *Prather v. McClelland* (Tex., 1894), 26 S. W. R. 657.

nected with his wife, into undue prominence, and to draw wrong conclusions therefrom. Be she as pure as snow and as chaste as Diana, of spotless bearing and purity in the estimation of everyone else, she shall not escape criticism in the eyes of her jealous and suspicious husband.

Some act by her, to which no one else would attach any importance, may, by reason of his misconstruction of its meaning, so arouse his jealous rage and excite his suspicion, that his love for her is changed into the greatest of aversion. "Trifles light as air are, to the jealous, confirmation strong as proof of holy writ." This is absurd, it is unwise and unjust, but it is not an insane delusion in law.¹

So, *a fortiori*, if the basis for the belief of the testator that his wife is unchaste is rumors as to her character and actions which have been circulated in the neighborhood, and which have finally reached the ears of her husband, the belief is not an insane delusion, for it has *some basis outside of the imagination of the testator*. If the reports of the unchastity of the wife are true, there is no delusion; if they are not true, still no delusion exists, for the rumors, though they are groundless, are still some evidence, though very slight; for, had the testator been less jealous and less suspicious, and possessed greater confidence in his wife, he would not have allowed his mind to be influenced by them. If, however, there were *no rumors* and *no other evidence* of the infidelity of the wife, the belief of the testator would be an insane delusion, provided he persisted in it after argument or against all argument.²

§ 96. Belief in spiritualism and witchcraft as indicating testamentary incapacity.—The mere fact that a person believes in what is commonly known as spiritualism, that is to say, believes in the possibility of communications passing between the spirits of dead and living persons, is not enough *alone* to impeach his will. The prevalence of a belief in spiritualism in modern times among all classes of the community is remarkable. Hence to hold that because a person, otherwise intelligent and mentally well balanced, entertains the belief

¹ Potter v. Jones, 20 Oreg. 239, 251; N. Y. 190; In re Smith's Will, 24 N. Y. Cole's Will, 49 Wis. 179, 181, 182; Seamen's Friend Society v. Hopper, 33 N. Y. 619, 624; Clapp v. Fullerton, 34

N. Y. 190; In re Smith's Will, 24 N. Y. Supp. 928.

²In re Smith's Will, 24 N. Y. Supp.

928, 930.

that he or some other person possesses a peculiar power by which he is enabled to carry on conversations with denizens of the world beyond the grave, is conclusive evidence of testamentary incapacity, would invalidate many wills which were executed by persons undoubtedly competent.

The objection that the testator was a spiritualist is one that is frequently made, and, because of this fact, deserves consideration at length. The general rule is that a belief in spiritualism is not an insane delusion sufficient to destroy testamentary capacity.¹

Evidence that the testator believed in spiritualism is always relevant with the other facts of the case to show his mental condition, and may under some circumstances create a presumption of his insanity sufficient to cast the burden of proof upon the proponent of the will. The weight of such evidence always depends upon the circumstances of each case. It is well known that many persons of great intelligence and fine education have entertained the most peculiar and absurd theological beliefs. No reason exists why a belief in spiritualism should be singled out as raising a presumption of insanity simply because the majority of people do not entertain it. If we permit such a presumption in the case of spiritualism, we must recognize it in the case of any peculiar theological, religious or scientific belief which is a departure from ordinary modes of thought. To do this would be to create a test of insanity and of testamentary capacity which would be utterly unreliable. It would cause the question of testamentary capacity to be determined, not by a legal standard, but by the religious, theological or philosophical opinions of the person whose capacity was in question. So where the testator had been a persistent believer in witchcraft, had believed that he

¹ In re Spencer's Estate, 31 Pac. R. 453, 96 Cal. 448; Conner v. Stanley, 72 Cal. (1887), 566; Chafin's Will, 32 Wis. 563; Smith's Will, 52 Wis. (1873), 543, 550; Whipple v. Eddy, 43 N. E. R. 789, 161 Ill. 114; In re Halbert's Will, 15 Misc. 308, 37 N. Y. S. 157; Otto v. Doty, §1 Iowa (1883), 23, 25; Robinson v. Adams, 62 Me. 369; Lee v. Lee, 4 McCord (S. C., 1827), 183; Kelly v. Miller, 39 Miss. 17; McClary v. Stull, 44 Neb. 175, 62 N. W. R. 501; Middleditch v. Williams, 45 N. J. Eq. 726, 17 Atl. R. 826; In re Rohe's Will, 50 N. Y. S. 392; In re White's Will, 5 N. Y. S. 295; In re Keeler's Will, 8 N. Y. S. 629, 51 Hun, 636, 8 N. W. R. 616, 9 N. W. R. 665; Brown v. Ward, 53 Md. 377; Fulbright v. Perry County (Mo., 1898), 46 S. W. R. 955.

was a prophet divinely inspired to foretell future events, his capacity has been upheld where his delusion did not actually influence him in the execution of his will.¹

Though the testamentary capacity of the testator is not to be measured by his opinions, yet if those opinions are of a nature which produces a will which is wholly the result of them; in other words, if the will in question would not have been made if the testator had *not entertained some peculiar and extraordinary belief*, his testamentary capacity may well be doubted. For while a belief in spiritualism may be no indication of mental weakness, and may be entertained by a person who possesses a very high degree of mental strength, still the character of the doctrine itself, by alienating the person who entertains it from his fellows who have no sympathy with his opinion, and casting him into association with those who believe as he does, affords peculiar opportunities for the practice of undue influence upon him. Hence, evidence of a belief in spiritualism is always admissible to prove undue influence.²

And if the testator, because of his belief in spiritualism, and by the actions of those of a similar faith with whom he associates, is weaned from his kindred or alienated from his wife and children, so that he executes a will by which those who have claims upon his bounty are disinherited, a clear case of undue influence is made out which will invalidate the will.³ So, where it appeared that the beneficiary, who was a stranger to the testator, represented to him that he had a special dispensation to reform and spiritualize the world, and that the testator, shortly after the execution of the will, went insane upon spiritualism, that the will was solely the outcome of a delusion in regard to the duty which the testator felt he was under as a result of his belief in this doctrine and in connection with the influence of the beneficiary, the will was set aside.⁴

¹ Lee v. Lee, 4 McCord (S. C.), 183; Kelly v. Miller, 39 Miss. 17. In the case of Bonard's Will, 16 Abb. Prac. R. (N. Y.) 128, the testator was a devout believer in the doctrine of metempsychosis, and, despite this fact, his will was sustained.

² Woodbury v. Obear, 7 Gray (Mass.), 467.

³ In re Rohe's Will, 50 N. Y. S. 392; Thompson v. Hawks, 14 Fed. R. 902, 11 Bissell, C. C. (1883), 440; Robinson v. Adams, 62 Me. 869; Lyon v. Hone, L. R. 6 Eq. 655.

⁴ Orchardson v. Cofield, 171 Ill. 14, 49 N. E. R. 197. In Dunham's Appeal, 27 Conn. 193, on page 202, the court said: "All the books agree

§ 97. **Definition of lucid interval.**—In the case of a testator afflicted with permanent mental unsoundness, and particularly where the character of the mental disease is such that seclusion in an asylum and the appointment of a committee or a guardian have been required, it is incumbent upon the proponent of the will to show that the will was executed during a lucid interval. By this expression we are to understand either a cessation of the insanity for a period more or less lengthy, followed by a subsequent recurrence, or a perfect and permanent restoration to reason.¹ A lucid interval must be clearly distinguished from an intermission, or, as it is technically termed, a remission of the mental disease, which consists merely in an abatement or disappearance of the symptoms without any real

that a person has capacity to make a contract if he be of mature age, and can understand the nature of the contract and the effect of the language used to express his intention; and certainly the fact whether there be or not such a capacity must be judged of by scanning the daily conversation and conduct of the individual in matters of a like nature, and not by inquiring if in some particular thing, in no way relating to property or contracts, he fancies something which does not exist, and of which he has no reasonable evidence. The fact of such delusion may well go to the jury for what it is worth, on the general question of unsoundness, but it is not absolute and universal unsoundness. . . . Were we to decide that men cannot make contracts, nor dispose of their estates, however sensible and shrewd, because they fancy some things to exist which do not, and of which they have no reasonable evidence, at least so far as other persons can perceive, our courts would, ere long, present the spectacle of a plentiful harvest to the profession or the affairs of society must be arrested. What would be the condition of those who happen to have dealings with a

jealous husband, a suspicious neighbor, an infatuated lover, a deceived and half-crazed demagogue, a Hindoo worshipping an idol, a sincere and enthusiastic but deluded follower of Mahomet, or a modern spiritualist with his 'harmonial philosophy' and 'aerial spheres?' Are these men to be read out of society as insane on all subjects and rendered powerless to provide for themselves and their families? Lord Hale had a full belief in the existence of witches while he presided with distinguished ability in the highest court in England. Dr. Johnson was confident that he heard the voice of his deceased mother calling his name. Lord Herbert believed that a divine vision had indicated to him the correctness of a particular course of religious speculations, which, on the faith of the supposed vision, he published, and which he made the basis of his future action. The second Lord Littleton was equally persuaded that a divine warning had admonished him of his future death. The same was true of the Earl of Chesterfield. Abercrombie gives an instance of an habitual hallucination, which at the same time was consistent with reason."

¹Taylor, Med. Juris. 651.

temporary or permanent restoration to health. By a lucid interval is meant, according to the observation of a learned judge, not merely "a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure, but an interval in which the mind, having thrown off the disease, had recovered its general habit."¹ The distinction between a lucid interval and a remission is a very important one, of particular value where the insanity has been regarded as permanent, and has manifested itself in violent actions. The mere subsidence of violence upon the part of a lunatic who has been for a lengthy period in such a condition of extreme mental excitement as to be required to be controlled by the employment of force is obviously no proof of his restoration to reason. The fact that his demeanor has become quiet and calm may be the result of his physical exhaustion, or his calmness may be a deception on his part to procure the fulfillment of some secret purpose or end desired by him. But calmness of demeanor on the part of an insane person previously violent may mean much more than a mere abatement of the symptoms of his malady. It may indicate a partial or a complete restoration of the mental powers, particularly if it is coupled with a coherency of thought, as indicated by the patient's language. Some medical writers, standing comparatively high in the opinion of the profession, have denied the possibility of the existence of a lucid interval in the case of permanent insanity. It is pointed out by one of them that "there is no disposition to misinterpret the significance of remissions which occur in other diseases. No one thinks the epileptic is cured after he has had one fit and before the next; no one doubts that, unless the proper remedy is taken, the individual who has had a tertian ague will certainly have another paroxysm on the alternate day."²

Doubtless if there has been a traumatism or a lesion of the substance of the brain, or an actual decay or deterioration of the cells composing it, as occurs in *senile dementia*, resulting in a diseased mind, the reasoning of the writer from whom the quotation is taken is correct, and perhaps that is all he

¹ Lord Thurlow, in *Attorney-General v. Parnter*, 8 Bro. C. C. 444.

² Hammond, *Insanity in its Medical and Legal Relations*, 45 et seq.

meant to say. But ordinarily in cases of mania simply, according to the weight of the medical authorities, it may be possible to establish a lucid interval which is not merely a cessation of symptoms, but an actual restoration of the mental equilibrium, during which, if the lucid interval is sufficiently proved, the unfortunate person may execute a valid will, which ought to receive probate, though it shall appear that he subsequently relapsed into his former unfortunate condition.¹

§ 98. **The burden of proving the existence of a lucid interval.**—Accepting the verdict of the majority of the writers, both legal and medical, that a lucid interval may exist even in the case of what, at first, appears to be permanent insanity, and that a will executed during such an interval must be valid, it becomes necessary to inquire what amount and quality of proof are required to show that a lucid interval has occurred. The general rule sustained by all the cases is that the proponent of the will must overcome the presumption of the continuance of insanity, and this he must do by clear and satisfactory proof. He has the burden of proof to show that the testator was of sound and disposing mind when he executed the will. And if it shall appear that the testator had been judicially pronounced insane prior to the execution of the will, the proponent must produce some evidence showing a restoration to sanity other than that arising from the proper execution of the will. There must be the clearest proof that reason and testamentary capacity have been restored.²

¹See cases cited page 138, note 1. 12 S. R. 72; *Lucas v. Parsons* (1859), 27 Ga. 593, 607, 621; *Rush v. Megee*, 36 Ind. (1871), 69; *Chandler v. Barrett* (1869), 21 La. Ann. 58, 61; *Von de Veld v. Judy* (Mo., 1897), 44 S. W. R. 97; *Leonard v. Leonard*, 14 Pick. (31 Mass.) 280, 284; *Breed v. Pratt*, 18 Pick. 35 Mass. 115; *Stone v. Damon*, 12 Mass. (1815), 504; *Townsend v. Townsend*, 7 Gill (Md., 1848), 10, 31; *Jackson v. Vanduzen*, 5 Johns. (N. Y.) 144, 159 (1810); *Clark v. Fisher*, 1 Paige (N. Y.), 171, 174; *Gombault v. Public Adm'r*, 4 Bradf. (N. Y.) 226, 229; *Harden v. Hays*, 9 Pa. St. (1848), 151; *In re Gangwere's Estate*, 14 Pa.

Aubert, 6 La. Ann. 104, on p. 108.

²*Johnson v. Armstrong*, 93 Ala. 731, St. 417, 428; *Christman v. Christman*,

The nature of the proof and the facts which must be shown depend wholly upon the circumstances of each case. If the case is one of fixed and permanent mental derangement as distinguished from delirium or from delusions, the proof of the existence of a lucid interval may be difficult. If the mental derangement is temporary, resulting from physical disease, or from over-indulgence in alcoholic liquors or narcotics, proof of complete restoration to a condition of mind in which a valid will could be made would be comparatively easy. Under the latter circumstances a lucid interval would almost be presumed from proof of a restoration to physical health, or from proof that the person had discontinued the use of the stimulants or drugs which had resulted in his delusion or delirium. But suppose a case of mania which is characterized by the exhibition of great excitement and violence and which necessitated incarceration in an asylum, with more or less physical restraint, or suppose a case of fixed and permanent delusions bearing directly upon the disposition made, or of *senile dementia* involving a breaking down or disintegration of the cellular structure of the brain. Acute mania is usually intermittent, and the patient has intervals in which the paroxysms of his disease are sensibly abated. A person observing him at such a time may conclude that he is sane, though a contrary opinion would be formed by the same observer in case he saw him a few minutes later during the violence of his malady. On the other hand, if a person merely delirious becomes apparently rational, the probability is that he is really so, and that his delirium, which was only of a temporary nature, has passed away. That would easily be recognized not only as a lucid interval, but as a complete restoration to health. But a person who is permanently insane may, to all outward appearances, act and talk in the most rational manner, and yet there may be no real abatement of his malady. He may be just as unsound in his calmer moods as in his fits of raving.¹

16 Oreg. 127, 18 Pac. R. 6; Douglass' Estate, 162 Pa. St. 567, 568; Manley's Executors v. Staples, 65 Vt. 370, 375, 26 Atl. R. 630; Cochrane's Will. 1 Mun. (Va.) 263, 15 Am. Dec. 116, note; Beverley's Case, 4 Rep. 123; Kemble v. Church, 3 Hagg. 273; Nichols v. Binns, 1 Sw. & T. 239; Martin v. Johnson, 1 Fost. & Fin. 122; Cartwright v. Cartwright, 1 Phillim. 100; Ayrey v. Hill, 2 Add. 206.

¹ "The case then set up in opposition to the will is confessedly one of *delirium* as contradistinguished

The difficulty of proving the existence of a lucid interval in the case of a person afflicted with apparently permanent insanity is admitted to be great. It is augmented by the well-recognized fact that a lunatic may be quiet and calm in his demeanor without there being any real abatement of his malady. If the patient who is suffering from delirium which is the result of disease recovers his physical strength, the temporary mental disturbance commonly ceases and the mind recovers its wonted activity and regularity of action. If the cause of the mental irregularity be removed, the effect also disappears. But in the case of a patient in an asylum, or one under guardianship, it must not only be shown that the peculiar symptoms and actions which characterized his mental malady have disappeared, but *a restoration of his mental faculties must be shown which will be sufficient to enable him to know what he was doing when he executed the paper purporting to be his will.*

It is never requisite that the proponent shall prove that the testator has been restored to a condition of perfect mental health and vigor. To require this in the case of one who has been insane is to require more than in the case of one whose mental integrity has never been questioned. It is to require the impossible; for, in most cases, no mind which has once been

from fixed mental derangement or permanent, proper insanity. Now the two cases, however similar in some respects, are still distinguished, each from the other, in several particulars; and in no one particular more than in the greater comparative facility of proving a *lucid interval* in the one than in the other. A principal reason of this is the following: In cases of permanent, proper insanity the proof of a lucid interval is matter of *extreme* difficulty, as the court has often had occasion to observe, and for this, among other reasons, namely, that the patient so affected is not unfrequently *rational* to all *outward* appearance without any *real* abatement of his malady, so that in truth and substance he is just as insane in his apparently rational as he is in his visible raving

fits. But the *apparently* rational intervals of persons merely delirious for the most part are *really* such. Delirium is a fluctuating state of mind, created by temporary excitement; in the absence of which, to be ascertained by the *appearance* of the patient, the patient is most commonly *really* sane. Hence, as also from their greater presumed frequency, in most instances in cases of delirium the probabilities, *a priori*, in favor of a lucid interval are infinitely stronger in a case of delirium than in one of permanent, proper insanity; and the difficulty of proving a lucid interval is less in the same exact proportion in the former than it is in the latter case." Opinion of the court in the case of *Brogden v. Brown* (1825), 2 Add. 441, on p. 444, by Sir John Nicholl.

impressed by apparently permanent or fixed insanity, as distinguished from temporary insanity, is ever *wholly* restored to its former state. Even during a real cessation of the disorder, or after a permanent restoration to sanity, there remains an excited and sensitive condition not usually attendant upon the normal operation of a mind.

The strongest and best proof of the existence of a lucid interval is the voluntary and deliberate execution of a will which is reasonable and natural in its provisions. And the reasonable and natural character of the will is to be determined according to the particular circumstances which exist at its execution, and not according to a fixed and arbitrary standard to be set up by the court or jury. If, then, the will is natural and reasonable, and if it appears to have been voluntarily executed, the presumption is very strong that a lucid interval existed and that the testator was of sound and disposing mind, though he may have been previously adjudged incompetent to take care of his affairs.¹

The case of a person shown to have been violently insane must be distinguished from that of one who is only laboring under an insane delusion. Habitual insanity is often, if not always, accompanied by delusions; but, as is well known, not every one who has delusions can be called an habitual lunatic. In the case of one who has been permanently unsound of mind, restoration to reason, or, in other words, a lucid interval, *must be shown*. And a lucid interval would not be inferred unless there is a resumption of a calm demeanor upon the part of the person in question, and a reasonable degree of rationality in his conversation and conduct, both as regards his property and the persons by whom he is surrounded, and who, by nature or by kind services, have claims upon his bounty. These considerations are not applicable to him who is under a delusion. *His* actions have, in all probability, never been characterized by excitement or irrationality. His delusion is in most cases the result of a calm though erroneous process of reasoning; and the cause that his reasoning is erroneous is not so much the fact that the process adopted by him is defective as that the facts upon which it is based are untrue. There need be no

¹ Whitman v. Morey, 63 N. H. 448; Duffield v. Morris, 2 Harr. (Del.) 375; Davis v. Calvert, 5 Gill & J. (Md.) 269.

inquiry as to a lucid interval in his case. The question is not whether he had, at the time of the execution of the will, ceased to labor under the delusion, but was the will which he has made produced by the delusion? If, while he is entertaining and defending the most absurd delusion against reason and argument, he makes a will which is reasonable and just in its provisions, and which shows a proper understanding of his property and of those who have claims upon him, and which is in no respect the outcome of his delusion, it should be admitted to probate. The evidence should not be directed to show that a lucid interval has occurred during which he was free from the delusion which has beclouded his intellect, but rather to show that the delusion had no effect upon the execution or the character of the will which he has made.¹

§ 99. **The burden of proof and relevancy of evidence to show that the will was made in a lucid interval.**—If it shall appear from the evidence that the testator had at any time during his life been judicially pronounced insane and of unsound mind, and that he had been prior to the execution of the will, or that he is at the date of its execution, under the charge of a committee or guardian, a presumption of insanity is created which is continuous and which must be overcome before his will can be admitted to probate. If it appears that the testator had been adjudged insane prior to the execution of the will, and if it is also shown that his unsoundness of mind was not temporary delirium or delusion, but an apparently permanent mental condition, rendering him incapable of attending to his ordinary affairs and necessitating the appointing of a guardian to care for his property, it will be presumed to be continuous down to the time of the testamentary act. The

¹ *Nichols v. Binns*, 1 Sw. & Tr. 239; *Banks v. Goodfellow*, L. R. Q. B. 459, overruling *Waring v. Waring*, 6 Moore P. C. C. 341, 12 Jur. 947; *Smith v. Tebbitts*, L. R. 1 P. & D. 396; *In re Ruffino's Estate* (Cal., 1898), 48 Pac. R. 127; *Young v. Miller*, 145 Ind. 652, 44 N. E. R. 757; *Staples v. Wellington*, 58 Me. (1870), 453; *Robinson v. Adams*, 62 Me. (1874), 369, 401; *Brooke v. Townsend*, 7 Gill (Md.), 10, 31; *Sanderson v. Sander-* son, 52 N. J. Eq. 243; *Seamen's Friend Soc. v. Hopper*, 83 N. Y. (1865), 619, 624; *Potter v. Jones*, 20 Oreg. 230, 248, 25 Atl. R. 769; *In re Boyer's Estate*, 166 Pa. St. 630, 31 Atl. R. 359; *Cole's Will*, 49 Wis. (1880), 182; *Blake v. Rourke*, 74 Iowa, 522; *Barlow v. Waters*, 28 S. W. R. (Ky.) 785; *Aubert v. Aubert*, 6 La. Ann. 104, 108; *McMasters v. Blair*, 29 Pa. St. 298, 299; *In re Lyddy's Will*, 5 N. Y. Supp. 636.

burden of showing that the testator was sane at the date of the execution is then upon the proponent, and the evidence, in order to be sufficient to show a restoration to sanity, *i. e.*, to a sound and disposing mind, must be clear, explicit and satisfactory to a reasonable person.¹

§ 100. **Expert evidence of insanity.**—An expert witness may testify to the mental condition of the testator in one of three ways:

1. He may state his opinion based upon facts within his personal knowledge, observed by him in professional or social intercourse with the testator, either at the time of the execution of the will, or before or after that occasion.²

2. If the evidence is *not* conflicting, the medical expert may,

¹ *Murphree v. Senn* (Ala., 1898), 18 S. R. 264; *Terry v. Buffington*, 11 Ga. 342 (1852); *Dicken v. Johnson*, 7 Ga. 488; *Lucas v. Parsons*, 27 Ga. 598, 621 (1859); *Stevens v. Stevens*, 127 Ind. 560, 567 (1890), 26 N. E. R. 1078; *Harrison v. Bishop*, 181 Ind. 161, 165, 30 N. E. R. 1069; *Bever v. Spangler*, 98 Iowa (1895), 576, 601; *Blake v. Rourke*, 74 Iowa, 519, 522, 38 N. W. R. 392; *Overall v. Bland* (Ky., 1889), 12 S. W. R. 273; *Halley v. Webster*, 21 Me. (1842), 461, 463; *Higgins v. Carlton*, 28 Md. 115, 142; *Brooke v. Townshend*, 7 Gill & J. (Md.) 9, 31; *Hix v. Whittemore*, 4 Metc. (1842), 545, 547; *Fraser v. Jennison*, 49 Mich. 206; *Elkinton v. Brick*, 44 N. J. Eq. 154, 158, 15 Atl. R. 391; *Jackson v. Vanduzen*, 5 Johns. (N. Y.) 144, 159; *Gombault v. Public Adm'r*, 4 Bradf. (N. Y.) 226, 239; *Carter v. Beckwith*, 28 N. Y. 312, 316, 28 N. E. R. 582; *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *L'Amoureux v. Crosby*, 2 Paige (N. Y.), 422; *In re Flansborough's Will*, 82 Hun, 49, 31 N. Y. Supp. 177; *Clark v. Fisher*, 1 Paige (N. Y.), 171, 174; *Morrison v. Smith*, 3 Bradf. (N. Y.) 209; *Lapham's Will*, 44 N. Y. Supp. 90, 93; *Reichenbach v. Ruddach*, 127 Pa. St. 564, 24 W. N. C. 476, 18 Atl. R. 432; *Harden v. Hayes*, 9 Pa. St. 151; *In re Hoopes*, 174 Pa. St. 373; *Kerr v. Lunsford*, 31 W. Va. 659, 683, 8 S. E. R. 493; *Slinger's Will*, 72 Wis. 22; *White v. Dwyer*, 1 Ecc. R. 46; *Hall v. Warner*, 9 Ves. 611; *Stevens v. Van Cleve*, 4 Wash. C. C. 262. Proving that there has been a cessation of the outward manifestations of insanity is not enough to establish a lucid interval. It must appear that the mind has been restored to such an extent as to enable the testator to act voluntarily and intelligently. *Boyd v. Eby*, 8 Watts (Pa.), 66; *Lucas v. Parsons*, 27 Ga. 598, and cases cited.

² *Rutherford v. Morris*, 77 Ill. (1875), 397; *Carpenter v. Calvert*, 83 Ill. (1876), 62; *Blake v. Rourke*, 74 Iowa, 519, 38 N. W. R. 392; *Manatt v. Scott* (Iowa, 1898), 76 N. W. R. 717; *Hall v. Perry*, 87 Me. 569, 577; *Fayette v. Chesterfield*, 77 Me. (1885), 28; *White v. Bailey*, 10 Mich. (1862), 155, 159; *Crockett v. Davis*, 81 Md. 184, 31 Atl. R. 710; *McHugh v. Fitzgerald* (Mich., 1893), 61 N. W. R. 354, 355; *Kempsey v. McGinniss*, 21 Mich. (1870), 123; *In re Darragh*, 53 Hun, 591; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. R. 493; *In re Pitt*, 55 N. W. R. 149, 85 Wis. 162.

after he has heard *all* of it, give an opinion as to the condition of the mind of the testator;¹ and

3. The expert witness may give an opinion based upon a hypothetical state of facts, assumed to be true and corresponding with the evidence already offered.² The physician, in case his opinion is based upon personal observation of the deceased, ought to state the facts as observed, and which tend to show that he had, or did not have, the ability to transact ordinary business, or which tend to show the vigor of his mental powers.³ Among these facts may be included the declarations of the testator, evincing his mental condition at the time they were uttered; but not the statements of the nurses or other attendants, as the latter are no more than hearsay, and hence inadmissible.⁴ The issue of the *testamentary capacity of the testator* in the last analysis is for the jury to determine, and the opinion of the expert *directly on that point* is inadmissible.⁵ The expert may state in his opinion that the testator was or was not insane, or that he was weak mentally, or may characterize his conduct when he observed it as rational or the reverse; but he cannot give an opinion as to the testamentary capacity of the testator at the time of execution.⁶

¹ *Schneider v. Manning*, 121 Ill. 376, 387.

² *Meeker v. Meeker*, 74 Iowa, 352, 357, 37 N. W. R. 773; *Bever v. Spangler*, 93 Iowa, 576, 602; *In re Ames*, 51 Iowa (1879), 596, 603; *Howes v. Colburn*, 165 Mass. 385, 388; *Kempsey v. McGinniss*, 21 Mich. 123, 138; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. R. 493 (1888); *Lester v. Pittsford*, 7 Vt. (1835), 158, 161; *Morse v. Crawford*, 17 Vt. (1845), 499, 502; *Cram v. Cram*, 33 Vt. (1860), 15, 18.

³ *Schneider v. Manning*, 121 Ill. 376, 386; *Heald v. Thing*, 45 Me. 396; *Wetherbee v. Wetherbee*, 38 Vt. 454. *Contra*, *Crockett v. Davis*, 81 Md. 134, 31 Atl. R. 710.

⁴ See cases in last note.

⁵ *White v. Bailey*, 10 Mich. 156, 159; *Schneider v. Manning*, 121 Ill. 376, 386; *Manatt v. Scott* (Iowa, 1898), 76 N. W. R. 717; *Hall v. Perry*, 87 Me.

569, 577; *Farrel v. Brennan*, 32 Mo. 328; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 332; *Fairchild v. Dascomb*, 35 Vt. 398.

⁶ A medical man is a competent witness to give an opinion as to the physical or mental condition of the testator. He may be permitted to describe the degree of imbecility or intelligence in his own language. He should not be asked questions which call for a direct expression of opinion upon the issue of testamentary capacity, as, for example, whether the testator had such capacity, or had sufficient intelligence or mental capacity, or was capable or competent to make a will. Such a question calling for conclusions is not permissible even when all the facts proved or assumed to be proved are included in it. *Hall v. Perry*, 87 Me. (1895), 569, 577; *Kempsey v. McGinniss*, 21 Mich. (1883), 123; *May v.*

§ 101. **The qualifications of the witness as an expert and the weight of his evidence.**—The question whether the witness is an expert is one of law for the court to determine before his evidence is received, not in its discretion, but upon a *prima facie* proof of sufficient qualification and previous experience and training. His competency as an expert must be shown before he shall be permitted to testify. If the court is satisfied that he is an expert, his evidence may be received, subject to a cross-examination as to his prior professional education and experience. If, upon such cross-examination, it shall appear that he was not qualified as an expert witness, his testimony ought to be stricken out altogether.¹

§ 102. **The testimony of non-expert witnesses to the capacity of the testator.**—A subscribing witness may testify to *his opinion as to the testamentary capacity of the testator* formed at the execution of the will.² He need not, in giving his opinion, state the facts which he has observed and upon which it is founded, as in the case of other non-expert witnesses.³ But he cannot give an opinion as a subscribing witness to the sanity of the testator, at the date of the execution, based upon what

Bradlee, 127 Mass. 414. A priest whose duty it is to determine the mental condition of those applying to him for purposes of confession and absolution, and who had, during his period of instruction in a theological seminary, pursued the study of psychology and physiology in order to qualify himself to determine such mental condition, may testify, as an expert witness, to the sanity of a testator to whom he administered the last rites of his church. *Estate of Toomes*, 54 Cal. 509, 511, 1 Amer. Prob. R. (1880), 275, 277.

¹ See Underhill on Evidence, pp. 271, 272.

² *Crandall's Appeal*, 63 Conn. 365, 28 Atl. R. 531; *Field's Appeal*, 36 Conn. 277, 279; *Ethridge v. Bennett*, 9 Houst. (Del., 1891), 295; *Potts v. House*, 6 Ga. 324; *Andrews v. Black*, 43 Ill. 256, 259; *Taylor v. Cox*, 153 Ill. 220, 226, 38 N. E. R. 656; *Parsons v.*

Parsons, 66 Iowa, 754, 756, 21 N. W. R. 570; *Robinson v. Adams*, 63 Me. 369, 409; *Cilley v. Cilley*, 34 Me. (1852), 162, 164; *Williams v. Spencer*, 150 Mass. 846, 848, 23 N. E. R. 105; *Beaubien v. Cicotte*, 12 Mich. 459, 495; *Withinton v. Withinton*, 7 Mo. (1842), 589; *Hardy v. Merrill*, 56 N. H. 227; *Whitenack v. Stryker*, 2 N. J. Eq. 8, 9; *Elkinton v. Brick*, 44 N. J. Eq. 154; *In re McCarthy*, 55 Hun, 7, 10, 8 N. Y. S. 578; *In re Comstock*, 7 N. Y. S. 334; *Clapp v. Fullerton*, 84 N. Y. 190; *Heyward v. Hazard*, 1 Bay (S. C., 1794), 335, 350; *Kaufman v. Caughman* (S. C., 1898), 27 S. E. R. 16; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. R. 493; *Van Huss v. Rambolt*, 2 Coldw. (42 Tenn.) 139.

³ *Williams v. Spencer*, 150 Mass. 846, 23 N. E. R. 105; *Robinson v. Adams*, 63 Me. 369; *Clapp v. Fullerton*, 84 N. Y. 190.

he has observed at other times; but the facts and circumstances observed by the subscribing witness at other times may be brought out on the cross-examination. The evidence of the attesting witness is not in law entitled to any greater weight or credibility than is that of other persons who were present at the execution of the will;¹ though it is entitled to more weight, if it is credible, than that of expert or non-expert witnesses who were not present.²

A non-expert witness not a subscribing witness and not present at the execution of the will may, according to the weight of the decisions, testify to the mental condition of the testator. He must have had adequate opportunities for observation. He must have known the testator and must have seen his conduct and heard his conversation in order that his opinion shall have a proper basis. He cannot give an opinion which is based, wholly or in part, on hearsay, or upon the evidence taken in court or upon the observation of others, for in this respect he has no better capacity to form an opinion than any member of the jury.³

¹ *Crandall's Appeal*, 63 Conn. 365, 368; *Taylor v. Cox*, 153 Ill. 220, 226; *Burney v. Torrey*, 100 Ala. 157, 163.

² *Kerr v. Lunsford*, 81 W. Va. 659, 8 S. E. R. 493.

³ *Murphree v. Senn* (Ala., 1898), 18 S. R. 264; *Bulger v. Ross*, 98 Ala. 267, 273, 12 S. R. 808; *Burney v. Torrey*, 100 Ala. 157, 173, 14 S. R. 685, 21 S. R. 348; *Kelly v. McGuire*, 15 Ark. 555, 601 (1855); *Abraham v. Wilkins*, 17 Ark. (1856), 292, 322; *In re Carpenter's Estate*, 79 Cal. 382, 21 Pac. R. 835; *In re Wax's Estate*, 106 Cal. 343 (1895), 39 Pac. R. 624; *Kinne v. Kinne*, 9 Conn. (1831), 102; *Richmond's Appeal*, 22 Atl. R. 82, 59 Conn. (1890), 226, 242; *Shanley's Appeal*, 62 Conn. 325, 23 Atl. R. 245; *Kimberly's Appeal* (Conn., 1898), 36 Atl. R. 847; *Dunham's Appeal*, 27 Conn. (1858), 192; *Potts v. House*, 6 Ga. 324; *Walker v. Waller*, 14 Ga. (1834), 242; *Florey v. Florey*, 24 Ga. (1858), 241, 247; *Stubbs v. Houston*, 33 Ga. 555, 564; *Keithley v. Stafford*, 126 Ill. 507, 520, 18 N. E. R. 740;

Craig v. Southard, 148 Ill. 87, 45, 35 N. E. R. 861; *Doe v. Reagan*, 5 Blackf. (Ind.) 217 (1839); *Staser v. Hogan*, 120 Ind. 207, 21 N. E. R. 911; *Cline v. Lindsey*, 110 Ind. 337, 11 N. E. R. 441; *Severin v. Zack*, 55 Iowa (1880), 28, 30, 7 N. W. R. 404; *Meeker v. Meeker*, 74 Iowa, 352, 355, 37 N. W. R. 773; *In re Norman*, 72 Iowa, 84, 86, 33 N. W. R. 374; *Dening v. Butcher*, 91 Iowa, 425, 59 N. W. R. 69; *In re Goldthorp*, 94 Iowa, 336, 343, 62 N. W. R. 845; *Parsons v. Parsons*, 66 Iowa, 754, 757; *Overall v. Bland* (Ky.), 12 S. W. R. 273; *Sydner v. Cunningham* (Ky.), 16 S. W. R. 130; *Newcomb's Ex'r v. Newcomb*, 96 Ky. 120, 27 S. W. R. 997; *Bridgman's Appeal*, 83 Me. 323, 19 Atl. R. 824; *Townsend v. Townsend*, 7 Gill (Md.), 10; *Dorsey v. Warfield*, 7 Md. 65; *White v. Bailey*, 10 Mich. (1862), 153, 161; *Beaubien v. Cicotte*, 12 Mich. 459, 495-508; *Rice v. Rice*, 50 Mich. 448; *Prentiss v. Bates*, 93 Mich. 234, 53 N. W. R. 153; *McHugh v. Fitzgerald*, 103 Mich. 21, 25, 61 N. W. R.

In the state of California it is provided by statute that the opinion of an intimate acquaintance of a person is admissible upon the question of his sanity.¹ It is the right of the court to decide whether the witness is an intimate acquaintance within the meaning of the statute.² And though the witness is an intimate acquaintance he cannot testify that the testator had or had not testamentary capacity, but must confine himself to giving an opinion of his general mental soundness or the reverse.³

A non-expert witness who, from observation, gives an opinion as to the mental condition of the testator must, so far as possible, relate the facts and circumstances upon which he bases his opinion, and which were within his own knowledge and observation. He must state these facts before⁴ he gives

354; *Sullivan v. Foley* (Mich., 1898), 70 N. W. R. 322; *Woodcock v. Woodcock*, 36 Minn. 217; *Pinney's Will*, 27 Minn. 280, 282; *Carpenter v. Hatch*, 64 N. H. 573, 576, 15 Atl. R. 219; *Hardy v. Merrill*, 56 N. H. 227, 239 (1875); *Sloan v. Maxwell*, 3 N. J. Eq. (1836), 563, 583; *Turner v. Cheesman*, 15 N. J. Eq. (1863), 243; *Den v. Gibbons*, 22 N. J. Law, 117, 135; *Culver v. Haslam*, 7 Barb. (N. Y., 1849), 314; *Wier v. Fitzgerald*, 2 Bradf. (N. Y.) 42; *Mowry v. Silber*, 2 id. 133; *Stewart v. Lispenard*, 26 Wend. (N. Y.) 291, 308; *De Witt v. Barley*, 9 N. Y. 371, 17 N. Y. 340; *Clapp v. Fullerton*, 34 N. Y. 190 (1866); *In re Ransdell*, 3 N. Y. S. 499, 51 Hun (1889), 636; *Petrie v. Petrie*, 53 Hun, 638, 6 N. Y. S. 831; *Journey's Will*, 44 N. Y. Supp. 548; *Grabill v. Barr*, 5 Pa. St. (1846), 441, 443; *Wilkinson v. Pearson*, 23 Pa. St. (1854), 117, 120; *Bricker v. Lightner*, 40 Pa. St. (1861), 199; *Commonwealth T. & T. Co. v. Gray*, 150 Pa. St. 255, 30 W. N. C. 435; *Trezevant v. Rains*, 85 Tex. 329, 25 S. W. R. 1092; *Brown v. Mitchell* (Tex.), 31 S. W. R. 621; *Gibson v. Gibson*, 9 Yerg. (17 Tenn., 1836), 329; *Frear v. Williams*, 7 Baxt. (66 Tenn.) 550, 1 Am. Pro. R. 85, 89; *Hazard v. Hazard*, 1 Bay (S. C.), 335, 340-344; *Cram v. Cram*, 33 Vt. (1861), 15;

Crane v. Northfield, 33 Vt. 124; *Cavendish v. Troy*, 41 Vt. (1868), 108; *In re Blood*, 62 Vt. 359, 19 Atl. R. 770; *Foster's Ex'r v. Dickerson*, 64 Vt. 233, 244, 24 Atl. R. 258; *Whitelaw's Ex'r v. Sims*, 90 Va. 588, 19 S. E. R. 113; *Burton v. Scott*, 3 Rand. (Va.), 399, 403, 405; *Mercer v. Kelso*, 4 Gratt. (Va., 1847), 106, 118; *Hoge v. Fisher, Peters' C. C.* 163, 165. But in Massachusetts the contrary view is taken, and the evidence of non-experts is rejected on the question of the insanity of the testator. *Poole v. Richardson*, 3 Mass. 330; *Buckminster v. Perry*, 4 id. 593; *Needham v. Ide*, 5 Pick. (Mass.) 510; *Bonnefort v. Gill*, 150 Mass. 346, 349, 350; *Williams v. Spencer*, 150 Mass. 493, 496; *McConnel v. Wildes*, 153 Mass. 487, 26 N. E. R. 1114; *Smith v. Smith*, 157 Mass. 389, 32 N. E. R. 348; *Melanefy v. Morrison*, 152 Mass. 473, 26 N. E. R. 36; *Hathorn v. King*, 8 Mass. 371; *Dickinson v. Barber*, 9 Mass. 225.

¹ Code Civil Pro., § 1870, subd. 10.

² *In re Wax*, 106 Cal. 343, 39 Pac. R. 624; *In re Carpenter*, 79 Cal. 382, 385, 21 Pac. R. 835.

³ *In re Taylor's Estate*, 92 Cal. 564, 28 Pac. R. 603.

⁴ *Hewlett v. Wood*, 55 N. Y. (1874), 364; *Hickman v. State*, 38 Tex. (1873),

an opinion, and any question put to him calling for his opinion must be based upon his evidence as thus given. If, in the opinion of the court, the circumstances observed were sufficient to enable him to form an opinion, it should then be admitted.¹ But if he cannot state any facts observed, his conclusion as to the mental condition of the testator is inadmissible.²

He need not, however, describe that which is incapable of description, nor narrate a sufficient number of facts to enable the jury to form an opinion themselves. The object of requiring the witness to relate the facts is to test his truthfulness, for then the evidence of these facts may be contradicted; and some of these facts on which the witness based his opinion of insanity may be explained by medical testimony. So the other side may, after hearing the facts, show that symptoms described and which are presumed to indicate insanity are absolutely inconsistent with it. But it is not possible to state any rule declaring how many facts the witness must have observed or must state in order that he shall be competent.³

The witness, whether a non-expert or an expert, may testify as to his opinion of the mental condition of the testator as it existed at the time of the facts which he observed, whether sound or unsound, and, having described his acts and language,

190; *Foster v. Dickerson*, 64 Vt. 233, 245; *Cram v. Cram*, 33 Vt. 15. But elsewhere it has been decided that the witness may give his opinion on his direct examination without stating all the facts observed, if they are brought out on his cross-examination. *Beaubien v. Cicotte* (1864), 12 Mich. 459.

¹The opinion may be received though based on knowledge acquired in a single interview. *Clary v. Clary*, 3 Ired. (N. C.) L. 78; *Potts v. House*, 6 Ga. 324; *Foster v. Dickerson*, *supra*.

²*Burney v. Torrey*, 14 S. R. 685, 100 Ala. 157, 178; *In re Carpenter's Estate*, 79 Cal. 383 (1889), 21 Pac. R. 835; *Parsons v. Parsons*, 66 Iowa, 754, 756 (1885), 21 N. W. R. 570; *Furlong v. Carraher* (Iowa, 1896), 71 N. W. R. 210; *O'Connor v. Madison*, 57 N. W.

R. 1005, 98 Mich. 183, 187; *In re Rapplee*, 66 Hun, 558, 21 N. Y. S. 801; *In re Hoopes' Estate*, 34 Atl. R. 603, 174 Pa. St. 373; *Foster v. Dickerson*, 64 Vt. 233, 244, 24 Atl. R. 253, and cases cited in note 3, p. 141.

³"It is in all cases important, with a view to confirm the opinion, that the witness should be able to state such facts as will show presumptively that his opinion is well founded. But it is not quite correct to say that the opinion of a witness is entitled to consideration only so far as the facts stated by him sustain the opinion, unless the proposition is understood to include among the facts referred to the acquaintance of the witness with the subject-matter and his opportunities for observation." *Sytleman v. Beckwith* (1876), 43 Conn. 9.

may characterize them as rational or irrational.¹ He may state that he observed nothing peculiar in the conduct of the testator, and that when he saw him he appeared and conversed as a man of good understanding. But he cannot give an opinion as to the general soundness or the reverse of the testator's mind; neither can he state that, in his opinion, the testator possessed a sound and disposing mind, nor answer any question which calls for a direct opinion as to testamentary capacity.² And where the issue is the existence of imbecility caused by *senile dementia* or idiocy rather than insanity producing delusions, a witness may state that in his opinion the testator, on the occasion he observed him, manifested decision and independence, and appeared capable of attending to his ordinary business affairs.

§ 103. Evidence of insanity in the family of the testator. Under some circumstances it seems that evidence that an ancestor of the testator, or some one of his collateral or direct kin, had been insane and had been confined in an asylum, is relevant upon the mental condition of the testator. This evidence, showing an hereditary predisposition to insanity, may, in connection with other facts, raise a presumption that the testator was insane. But this evidence is irrelevant where the causes of insanity are plainly shown to be dissimilar; as, for example, where it appears that the insanity of the ancestor was caused by pecuniary reverses, while that of the testator was the result of habitual intoxication or dissipation.³

§ 104. The relevancy of evidence of the mental condition of the testator.—The evidence to prove or to disprove the testamentary capacity of the testator, that is, to show his mental condition at the date of the execution of the will, usually takes a very wide range. Some courts let in the whole history of his mental condition from his childhood or earliest youth to his death; others limit the evidence to a period within a few years, or perhaps even within a few months, prior or subsequent

¹ See cases in note, p. 141.

² See cases cited in note, p. 141. But a witness may state that the testator had a childish countenance. *Irish v. Smith*, 8 S. & R. (Pa.) 578.

³ *Prentiss v. Bates*, 83 Mich. 234, 58 N. W. R. 153, 88 Mich. 567; *Reichen-*

bach v. Ruddach, 127 Pa. St. 564, 24 W. N. C. 476, 18 Atl. R. 432; *Baxter v. Abbott*, 7 Gray (Mass.), 71. Cf. *Coughlin v. Poulson*, 2 MacArthur, 308; and *Meeker v. Meeker*, 75 Ill. 260.

to the making of the will. No rule of competency can be stated, except the rather vague one that evidence of mental condition prior or subsequent to the making of the will must be sufficiently near in point of time to aid in determining the testator's condition at the time of the making of the will; and whether or not it is too remote is a question for the court to decide. But after this testimony is admitted its weight is always for the jury.¹

§ 105. The relevancy of an unnatural and unreasonable disposition by the testator to prove testamentary incapacity. The fact that the will of the testator makes an unnatural and unjust disposition of his property, or one which seems unreasonable in view of the circumstances of the case, may, according to the weight of the cases, be taken into consideration by the jury upon the issue of incapacity as well as upon the question of undue influence.²

The unnatural and unreasonable character of a will, voluntarily made, is by no means conclusive of the absence of testamentary capacity. Not even a legal presumption of incapacity

¹ Estate of Toomes, 54 Cal. 509, 519, 1 Am. Pro. R. 282; Kinne v. Kinne, 9 Conn. (1833), 102; Appeal of Dale, 17 Atl. R. 757, 57 Conn. 127; Fayette v. Chesterville, 77 Me. (1895), 28; Shailer v. Bumstead, 117 Mass. 143, 148; Lane v. Moore, 151 Mass. 87, 90; Dumangue v. Daniels, 154 Mass. 483, 486; Howes v. Colburn, 48 N. E. R. 125, 165 Mass. 385, 387; Prentiss v. Bates, 53 N. W. R. 158, 93 Mich. 234; Chrisman v. Chrisman, 16 Oreg. (1888), 127, 18 Pac. R. 6; Swails v. White, 149 Pa. St. 261, 24 Atl. R. 292. Where the mental disease alleged to exist was in its nature of long standing and progressive development, inquiries as to the mental condition of the testator may extend over a long period of time. Bever v. Spangler, 93 Iowa, 576, 61 N. W. R. 1072. This would be the case if the issue were *senile dementia* or insanity resulting from the lifelong use of intoxicating liquors. The judicial

decree of a court that testator is insane at a period prior to the execution of the will may be considered by the jury in determining whether he was insane at its execution; though this is never conclusive, even where there does not appear to have been any material change in his mental condition. In re Fenton's Will, 66 N. W. R. 99 (Iowa); Sewall v. Robbins, 29 N. E. R. 650, 139 Mass. 164.

² Coleman v. Robertson, 17 Ala. 84, 88; Bundy v. McKnight, 48 Ind. 502, 509; Lamb v. Lamb, 105 Ind. 457; Denison's Appeal, 39 Conn. 405; Sim v. Russell, 90 Iowa, 656, 659, 57 N. W. R. 601; Davis v. Calvert, 5 Gill & J. (Md.) 260; Brown v. Bell, 58 Md. 58; Barker v. Comins, 110 Mass. 477, 488; In re Burns' Will, 121 N. C. 336, 28 S. E. R. 519; Prather v. McClelland (Tex.), 20 S. W. R. 657; In re Jackman, 26 Wis. 104, 116 (1865); Conway v. Vizzard, 122 Ind. 266, 23 N. E. R. 771.

arises therefrom to be rebutted or explained away by evidence.¹ A man is under no legal obligation to give his property to his children or his relatives. No rule of law prohibits him from disinheriting his children altogether, or from making a most unequal division of his estate among them.

The right to discriminate among his children in making a testamentary disposition of his property is one of the most valuable rights which he possesses. By the exercise of this right he is enabled to enforce his commands during his life by reasons which appeal to the self-interest of his children, where motives to obedience, arising from filial affection, no longer exist. He is enabled to punish the undutiful and disobedient, and to reward those of his children who have given heed to his commands. By means of the privilege of unequally dividing his estate he can reward the faithfulness and industry of a diligent son, and protect the dissipated and improvident son from his own folly, while at the same time he provides a sufficient sustenance to keep him from want. He is enabled to secure for himself in his declining years the attention and care that his age and physical infirmities require, and which none can render so well as one's own offspring. How natural is it, therefore, for a father, in disposing of his property by will, to give to one child who has remained with him, faithfully caring for him in the decline of his years, who is married to one who is highly approved of by the father, and who has reared a family under the eyes of the latter, a larger share of his estate than another child receives, who, leaving his father's home in youth or early manhood, has made his way in the world and accumulated wealth in some distant city, never seeing his father nor caring for his welfare during a long life-time.

Not only is this discrimination natural, but it is commendable and consistent with the rules necessary for the preservation of the family and for the promotion of parental authority. So, too, going a step further, a parent may, if he has testamentary capacity and the will is not the product of undue influence, disinherit his children and leave all his property to strangers.²

¹ *In re Budlong's Will*, 126 N. Y. 423 429; *Knox v. Knox*, 11 S. R. 125, 95 (1891), 27 N. E. R. 945; *Muir v. Miller*, Ala. 495.
72 Iowa, 585, 589 (1887), 34 N. W. R.

² 4 Kent, Com., p. 510, and cases cited in next note.

And the fact that such a disposition of the property, made under such circumstances, is prompted by motives of caprice or prejudice not having any sufficient foundation in the opinion of other persons will not be sufficient to overturn the will unless a delusion amounting to insanity is proved to have existed.¹

It is therefore reversible error for the court to single out an unequal distribution from all facts in evidence and to give a special instruction as to the effect that would have in determining that the testator was insane.² The most that should be told the jury is that they may consider unnatural and unreasonable provisions, not alone, but in connection with all the evidence; and that, though they may *believe* the testator was not prompted by natural affection when he made the will, or though they may *think* its provisions are *grossly unjust*, still if, upon *all* the evidence, they believe the testator possessed capacity, his will must be sustained.³

¹ *Coleman v. Robertson*, 17 Ala. 84, 88; *Henry v. Hall*, 106 Ala. 84, 98; *In re Kaufman's Estate*, 117 Cal. 288, 295, 49 Pac. R. 192; *McDevitt's Estate*, 95 Cal. 17; *Billings' Appeal*, 49 Conn. (1881), 456, 461; *Carter v. Dixon*, 69 Ga. 82, 90; *Clearwater v. Kimler*, 43 Ill. 272; *Houser v. Harris*, 42 Ill. 425; *Uhlich v. Muhlke*, 61 Ill. 499 (1871); *Salisbury v. Aldrich*, 118 Ill. 199, 202; *Schneider v. Manning*, 121 Ill. 376, 383, 385; *Rutherford v. Morris*, 77 Ill. 397, 414; *Webber v. Sullivan*, 58 Iowa, 260; *Manatt v. Scott* (Iowa, 1898), 76 N. W. R. 717; *Conway v. Vizzard*, 122 Ind. 266, 28 N. E. R. 771; *Sherley v. Sherley*, 81 Ky. 240, 247; *Zimlich v. Zimlich*, 90 Ky. 655, 661, 14 S. W. R. 837; *Newcomb's Ex'rs v. Newcomb*, 96 Ky. 120, 27 S. W. R. 997; *Kevill v. Kevill*, 2 Bush (65 Ky.), 614, 615; *Hiss v. Weik*, 78 Md. 439, 448; *Higgins v. Carlton*, 28 Md. 115 (1867); *Pierce v. Pierce*, 38 Mich. 412, 420 (1878); *Fraser v. Jennison*, 42 Mich. 206, 232; *Rice v. Rice*, 50 Mich. 448, 456 (1883); *Couch v. Gentry*, 118 Mo. 248, 20 S. W. R. 890; *Hammond v. Dike*, 42 Minn. 273; *Marshall's Ex'rs v. Hadley*, 50 N. J. Eq. 547 (1893), 25 Atl. R. 325; *Boylan v. Meeker*, 28 N. J. Law, 274; *Potter v. McAlpine*, 3 Dem. Sur. 108, 115; *Marvin v. Marvin*, 3 Abb. Ct. App. Dec. 192; *Horn v. Pullman*, 72 N. Y. 269, 275; *Clapp v. Fullerton*, 34 N. Y. 190, 197, 199; *Budlong's Will*, 126 N. Y. 423, 432; *Gamble v. Gamble*, 39 Barb. (N. Y., 1863), 373; *Jackson v. Jackson*, 39 N. Y. 153, 157; *In re Trich*, 30 Atl. R. 1053, 165 Pa. St. 586; *Loeser's Estate*, 167 Pa. St. 498; *Coffman v. Hedrick*, 82 W. Va. 119, 132, 9 S. E. R. 65; *Bilner v. Bilner*, 65 Pa. St. 362; *Eckert v. Flowry*, 43 id. 46; *Couch v. Eastham*, 29 W. Va. 784; *Martin v. Thayer*, 37 W. Va. 38, 43; *Kaufman v. Caughman*, 49 S. C. 159, 170; *Lee v. Lee*, 4 McCord (S. C.), 181; *Kirkwood v. Gordon*, 7 Rich. (S. C.) L. 474; *Vance v. Upson*, 66 Tex. 476, 1 S. W. R. 179.

² *Bledsoe v. Bledsoe*, 1 S. W. R. 10; *Zimlich v. Zimlich*, 90 Ky. 655, 14 S. W. R. 837.

³ *Pooler v. Christman*, 145 Ill. 405, 34 N. E. R. 57.

And it is for the jury and not the court to determine upon all the evidence whether a will is or is not unnatural. The judge cannot say, as matter of law, that a will is unnatural because it discriminates between or among the heirs or the next of kin of the testator, of the same degree of relationship; or because it excludes some or all of them and gives the property to strangers. Whether the will is unnatural must be determined by the jurors weighing all the facts and circumstances, and, having decided that it is unnatural or the reverse, they may take that fact into consideration in ascertaining whether the testator had capacity, and, if so, whether the will is the result of undue influence.¹

§ 106. **The declarations of the testator to show testamentary capacity.**—Whatever the testator said at the time of executing the will (*i. e.*, from the moment he prepares a draft or gives instructions for its preparation to and including the moment when the transaction is completed by his signature and the attestation) is received to prove or to disprove the existence of capacity as a legitimate part of the *res gestæ* of execution. A man's mental condition is indubitably and unmistakably manifested by his language as well as by his conduct. Either party to the probate is at liberty to attempt to prove the strength or weakness of the mind of the testator by proving his declarations, nor is the rule restricted to such as are

¹Henry v. Hall, 106 Ala. 84, 99. An instruction that lays down the rule without qualification that the jury "have nothing to do with the propriety or impropriety of the bequests mentioned in said writing, or as to whether said bequests were just or unjust, or as to whether said bequests should or should not have been made," is error. McCommon v. McCommon (Ill., 1892), 31 N. E. R. 491, 151 Ill. 428, 38 N. E. R. 145. "The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor on the soundness of his reasoning. He may do what he will with his own, and if there be no defect of testamentary capacity and no undue influence or fraud, the law gives effect

to his will, though its provisions are unreasonable and unjust." Clapp v. Fullerton, 34 N. Y. 190 (1865), p. 197. And in McDevitt's Case, 95 Cal. 17, the court said: "The right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners; and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what is just and proper."

contemporaneous with execution. His prior or his subsequent sayings may be received, if not too remote, as tending to show his mental condition at the date of execution. They may show, or tend to show, that he was sane or insane at the time that they were uttered, and may create a presumption that this mental condition existed continuously down to and at the date of execution.¹

And the prior declarations of the testator, which show an intention that conforms to the testamentary disposition made, are admissible where the will is executed under circumstances which are calculated to create a presumption of incapacity,—as where the testator executes the will upon a sick bed with his physical and mental faculties impaired by illness.² Thus, it may be shown that on a prior occasion the testator had, while in robust health, given instructions for, or had executed, a will similar in its provisions to that which is now offered for probate.³

The declarations of the testator are always admissible to explain his conduct⁴ if it is shown that they accompany and illustrate such conduct.⁵ Conversations in the presence of the testator referring to his insanity, during which he remained silent, though the statements made therein called for a response, may be received to show his insanity. But the correspondence of third persons with the testator, found among his papers after his death, is not competent to prove his insanity or sanity unless his conduct with reference to it is also shown.⁶

¹ *Bulger v. Ross*, 98 Ala. 267, 12 S. R. 803; *Kinne v. Kinne*, 9 Conn. 104; *Dennison's Appeal*, 29 Conn. 899; *Moore v. Gubbins*, 54 Ill. App. 163; *Reynolds v. Adams*, 90 Ill. 134; *Bates v. Bates*, 27 Iowa, 110, 113, 1 Am. Prob. R. 260; *Parsons v. Parsons*, 66 Iowa, 754, 756; *Bever v. Spangler*, 93 Iowa, 576, 597; *Conway v. Vizzard*, 123 Ind. 266, 268, 23 N. E. R. 771; *Brown v. Mitchell*, 29 S. W. R. 927, 31 S. W. R. 621, 87 Tex. 140; *Haines v. Hayden*, 95 Mich. 332; *Waterman v. Whitney*, 11 N. Y. 157; *Tunison v. Tunison*, 4 Bradf. 438; *Peery v. Peery*, 94 Tenn. 328, 331; *Beadle v. Alexander*, 9 Baxter. 604, 606; *Maxwell v. Hill*, 5 Pickle, 584, 594, 595; *Kirkpat-*

rick v. Jenkins (Tenn., 1898), 33 S. W. R. 919; *In re Burns* (N. C., 1898), 28 S. E. R. 919. A draft of a revoked will may be received to show the sanity of the testator. *Thornton v. Thornton*, 39 Vt. 122.

² *Hammond v. Dike*, 42 Minn. 273, 44 N. W. R. 61. And see cases in last note.

³ *McConnell v. Wildes*, 153 Mass. 487, 489, 26 N. E. R. 1114; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. R. 837.

⁴ *In re Brown*, 38 Minn. 112, 35 N. W. R. 726.

⁵ *Clements v. McGunn* (Cal., 1899), 33 Pac. R. 920.

⁶ *Wright v. Tatham*, 5 C. & E. 670, 7 Ad. & Ell. 313.

§ 107. **The suicide of the testator as proof of insanity.**—The suicide of the testator is never conclusive proof of insanity, and *a fortiori* it is merely one circumstance which may tend to show testamentary incapacity. It raises no presumption against capacity, but may be considered as a relevant fact on that issue in connection with all the evidence.¹ Suicide is not conclusive of testamentary incapacity, even though it may take place immediately after the execution of the will; for, admitting that the deceased is *then* insane, and that his rash act is the result of his insanity, the species of insanity which exists, or which is assumed to exist, may have been perfectly consistent with the possession and exercise of a sound discretion and judgment in the management and testamentary disposition of his property.²

§ 108. **Testamentary capacity of those addicted to the habitual use of intoxicating liquors.**—No rule of law denies to a man who is dissipated and habitually addicted to the excessive use of intoxicants the right to make a testamentary disposition of his property.

The habitual use of intoxicating liquors, long continued and indulged in to excess, even though resulting in temporary fits of insanity or *delirium tremens*, does not *alone* raise a presumption of testamentary incapacity, if it appears that the deceased was sufficiently sober when executing the will to know what he was doing, and that he was not unduly influenced. Nor need he be shown to have been wholly sober at the instant of the execution of the will, if it is proved that he was sufficiently so to understand the character and effect of his act, the extent of his property and the nature of the claims of his kin, and to be able to act of his own will.³

¹Succession of Bey, 46 La. Ann. 773, 15 S. R. 297; Duffield v. Morris, 2 Harr. (Del.) 375, 382; Koegel v. Egner (N. J. Eq.), 85 Atl. R. 394; Frary v. Gusha, 59 Vt. 257, 9 Atl. R. 549; Brooks v. Barrett, 7 Pick. (Mass.) 94; In re Card's Will, 8 N. Y. Supp. 297, 55 Hun, 607; Burrows v. Burrows, 1 Hagg. 109. It is proper to permit a physician to state that suicide is *some* evidence of insanity. Frary v. Gusha, *supra*.

²In a recent case where the deceased had displayed marked mental derangement, had an insane delusion that his family was conspiring to place him in an asylum, that his daughter was endeavoring to poison him, and where he finally killed his wife and inflicted mortal injuries upon himself, the will was set aside. In re Kahn's Will, 5 N. Y. Supp. 556, 559, 1 Con. Sur. 510.

³"In order to vitiate the act, the

But the fact of drunkenness when the will was executed is always relevant upon the question of undue influence. For a man whose mental and physical powers are weakened and confused by alcoholic intoxicants cannot, while he is under this influence, exert his will in its full vigor or manfully resist the importunity of those about him.¹

§ 109. **Inebriety resulting in mania a potu.**— The characteristics of temporary insanity which is the result of an over-indulgence in alcoholic stimulants are clearly distinguishable by the most superficial observer from symptoms which attend

testator, at the time of executing the paper, must have been under the influence of intoxicating liquors, and to such an extent as to disorder his faculties and prevent his judgment." *Peck v. Cary*, 27 N. Y. 9; *In re Miller's Estate*, 36 Atl. R. 139; *Duffield v. Morris*, 2 Harr. (Del.) 375; *Ball v. Kane* (Del.), 39 Atl. R. 773; *Bush v. Lisle*, 89 Ky. 393, 399, 12 S. W. Rep. 762; *Pierce v. Pierce*, 38 Mich. 412, 417, 17 Amer. Law Reg. (N. S.) 744; *Fluck v. Rea*, 51 N. J. Eq. 233, 235, 27 Atl. R. 636; *In re Lee*, 46 N. J. Eq. 193, 18 Atl. R. 525; *Koegel v. Egner* (N. J.), 35 Atl. R. 394; *Bannister v. Jackson*, 45 N. J. Eq. 702, 707, 17 Atl. R. 692; *Elkinton v. Brick*, 44 N. J. Eq. 154, 158, 15 Atl. R. 391; *In re Jones' Will*, 25 N. Y. Supp. 109, 5 Misc. R. 199; *In re Tacke's Will*, 3 N. Y. Supp. 198; *In re Reed's Will*, 2 Con. Sur. 403, 20 N. Y. Supp. 91; *Lewis v. Jones*, 50 Barb. 645; *Ex parte Patterson*, 4 How. Pr. R. 34; *In re Watson*, 12 N. Y. Supp. 115; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526; *In re Halbert's Will*, 15 Misc. R. 308; *In re Peck's Will*, 62 Hun, 622, 17 N. Y. S. 248; *McSorley v. McSorley*, 2 Bradf. (N. Y.) 188, 189; *Julke v. Adam*, 1 Redf. 454; *In re Fow's Estate*, 147 Pa. St. 264, 265, 23 Atl. R. 447; *In re Dugan's Will*, 6 Pa. Dis. Ct. R. 22; *Reichenbach v. Ruddach*, 137 Pa. St. 564, 573, 24 W. N. C. 476, 18 Atl. R. 432; *Appeal of Harmony*

Lodge, 127 Pa. St. 269, 24 W. N. C. 366, 18 Atl. R. 10; *Thompson v. Kyner*, 65 Pa. St. 368.

¹*Duffield v. Morris*, Ex'r, 2 Harr. (Del.) 375; *Bush v. Lisle*, 89 Ky. 393, 399, 12 S. W. R. 762; *Pierce v. Pierce*, 38 Mich. 412, 417 (1878), 17 Amer. Law Reg. (N. S.) 744; *Fluck v. Rea*, 51 N. J. Eq. 233, 235 (1893), 27 Atl. R. 636; *In re Lee*, 46 N. J. Eq. 193, 18 Atl. R. 525; *Koegel v. Egner* (N. J.), 35 Atl. R. 394; *Bannister v. Jackson*, 45 N. J. Eq. 702, 707 (1889), 17 Atl. R. 692; *Elkinton v. Brick*, 44 N. J. Eq. 154, 158, 15 Atl. R. 391; *In re Jones' Will*, 25 N. Y. Supp. 109, 5 Misc. R. 199; *In re Tacke's Will*, 3 N. Y. Supp. 198; *In re Reed's Will*, 2 Con. Sur. 403, 20 N. Y. Supp. 91; *Lewis v. Jones*, 50 Barb. 645; *Ex parte Patterson*, 4 How. Pr. R. (N. Y.) 34; *In re Watson*, 12 N. Y. Supp. 115; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526; *In re Halbert's Will*, 15 Misc. R. 308; *Peck v. Cary*, 27 N. Y. 9, 17, 38 Barb. 77; *In re Peck's Will*, 62 Hun, 622, 17 N. Y. Supp. 248; *McSorley v. McSorley*, 2 Bradf. (N. Y.) 188, 189; *Julke v. Adam*, 1 Redf. 454; *In re Fow's Estate*, 147 Pa. St. 264, 265, 23 Atl. R. 447; *In re Dugan's Will*, 6 Pa. Dis. Ct. R. 22; *Reichenbach v. Ruddach*, 137 Pa. St. 564, 573, 24 W. N. C. 476, 18 Atl. R. 432; *Appeal of Harmony Lodge*, 127 Pa. St. 269, 24 W. N. C. 366, 18 Atl. R. 10; *Thompson v. Kyner*, 65 Pa. St. 368; also *post*, § 109a.

other forms of mental unsoundness. In *delirium tremens* the periods of insanity are of limited duration, and these are succeeded by intervals of calm, during which the patient, though perhaps physically exhausted, is mentally himself again. As the sufferer proceeds along the road to his ultimate recovery, the paroxysms are less severe and of shorter duration, and the intervals between them grow longer and more frequent. If the course of the disease is favorable, the gradually diminishing paroxysms at length cease altogether, and the patient, provided his physical system has been fortified by proper methods to withstand the strain put upon it, finds himself fully restored to reason. The insidious poison contained in the alcohol, which has produced in his excited brain the delusions which have tortured his waking hours and made his sleep a thing of horror, having been eliminated from his system, the delusions themselves have totally disappeared. Such a state of delirium as has been described is wholly temporary, for the reason that the cause which produced it is temporary; and the cause being removed, the effect will also disappear. Here there is no question of a lucid interval. The man is restored to his former health and his reason is again firmly seated on her throne. True it is, that if he shall repeat his former error the result may be the same or perhaps worse. But that would be a new delirium, not a continuation of the former one. For, while he is sober, he is sane and possesses testamentary capacity.¹

For it must not be forgotten that where permanent insanity is shown, whatever its cause, a lucid interval must be proved to have supervened during which the will was executed, and that the burden of proof to show this is upon the proponent of the will. But in cases of temporary delirium, arising from the excessive use of stimulants, and where no question of fixed mental unsoundness is involved, the doctrine of lucid intervals does not apply.² Though the testator may have, when under the influence of liquor, acted like a maniac, still, if when subsequently sober he acted rationally and sanely, the *onus* is on the party asserting his testamentary incapacity to show that he was incapable at the date of the execution of the will. The rule is the same where it conclusively appears that on one or

¹ In *re* Levis, 140 Pa. St. 179, 21 Atl. R. 242; also cases in note 1, p. 151. ² *Lee's Will*, 46 N. J. Eq. 193, 203, 18 Atl. R. 525.

more occasions prior to the time of execution the testator had had attacks of *mania a potu*.¹

§ 109a. **Permanent insanity caused by habitual drunkenness.**—The habitual and excessive use of intoxicating liquors as a beverage, continued for some time, may, according to the best medical authorities, result in permanent insanity. By permanent insanity is meant, in this connection, not merely *mania a potu*,² but a condition of fixed and continuous mental unsoundness. Permanent insanity, however, cannot be presumed from proof of habitual drunkenness, however excessive or long continued. And the fact that the testator at the time of the execution of the will is in charge of a guardian as an habitual drunkard, while relevant as some evidence of incapacity, is never conclusive that a will is invalid.³ But proof of habitual drunkenness is always relevant upon the issue of insanity, its weight depending upon all the circumstances of the case.⁴ Whether long-continued inebriety has or has not impaired the mind and destroyed a sound and disposing memory is always a question of fact, which will depend upon all the circumstances, including the physical and mental condition of the testator, his age and sex, and his previous life and present surroundings. All these facts must be considered in connection with the habit of the testator.

It is well known that the effect of indulgence in intoxicating drink varies according to the circumstances and bodily condition of the person. Some can drink large quantities of liquor without any apparent diminution of their physical or mental powers, either because they are of exceptional physical strength and vigor, or because their avocations minimize the intoxicat-

¹ *Temple v. Temple*, 1 Hen. & M. (Va., 1807), 476; *Duffield v. Morris*, 25 W. N. C. 366, 18 Atl. R. 10; *Black v. Ellis*, 3 Hill (S. C.), L. 68.
² See *ante*, § 109.
³ *Damon v. Stone*, 12 Mass. (1815), 488, 489; *Breed v. Pratt*, 18 Pick. (35 Mass.) 115, 116; *Lewis v. Jones*, 50 Barb. (N. Y.) 645; *Van Wyck v. Bra-shear*, 81 N. Y. (1880), 260; *In re John-son*, 7 Misc. R. 220; *In re Reed's Will*, 2 Con. Sur. 403.
⁴ See cases cited in note 3, p. 150.

ing and debilitating effect of what they drink. Others succumb to the most ordinary indulgence. The imbibation of a quantity of liquor which in one case would produce little, if any, effect, may in the other produce a high state of mental excitement, and, if long continued, a permanent cerebral deterioration. In determining, therefore, whether habitual drunkenness has or has not resulted in permanent insanity, or in delusions assimilating to that condition, the evidence must not be confined to the personal habits of the testator, but must take a wide range along the lines just pointed out.

No presumption that a man was so drunk when he made a will that he was incapable of making it properly, arises from proof that he had been drunk at a prior period, or that he was an habitual drunkard. The intoxication of the testator, if it is proved to exist at the date of the execution of the will, must have been of such a character as to have deprived him of judgment while executing it.¹ For, in order that the will of a drunkard may be invalidated because of his habits of intoxication, it must appear affirmatively either that his mind was totally destroyed thereby,² or, if this is not shown, that he was so far under the influence of intoxicants at the instant of its execution that he was incapable of comprehending the nature, extent and disposition of his estate and his relations to those who have a claim upon his bounty.³ And the burden of proof is always upon the contestant, even where it conclusively appears that the testator had been judicially pronounced an habitual drunkard, to show that he was in such a condition from intoxicants at the time of execution as not to have testamentary capacity.⁴

¹ *Ball v. Kane* (Del. 1899), 39 Atl. R. 778.

² See §§ 108, 109.

³ *Andress v. Weller*, 3 N. J. Eq. 604 (1834); *Pierce v. Pierce*, 38 Mich. 412; *Lee's Will*, 46 N. J. Eq. 193 (1863), 18 Atl. R. 525; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Elkinton v. Brick*, 44 N. J. Eq. 154, 158, 15 Atl. R. 391; *Gardner v. Gardner*, 22 Wend. (N. Y., 1839), 526; *In re Reed's Will*, 20 N. Y. S. 91, 2 Con. Sur. 403; *Down v. McGourkey*, 78 N. Y. (1879), 614; *Peck v. Cary*, 27 N. Y. (1863), 9, 24; *Brown v. Torrey*, 24 Barb. (N. Y., 1857), 583;

Van Wyck v. Brasher, 81 N. Y. 260; *In re Johnson*, 7 Misc. R. 220; *Halbert's Estate*, 15 Misc. R. 318, 323; *McSorley v. McSorley*, 2 Bradf. (N. Y.) 188, 199; *Appeal of Harmony*, 127 Pa. St. 269, 24 W. N. C. 366, 18 Atl. R. 10; *Black v. Ellis*, 3 Hill (S. C.), L. 68; *Thompson v. Kyner*, 65 Pa. St. (1870), 368; *Nussear v. Arnold*, 13 S. & R. (Pa., 1835), 323; *Temple v. Temple*, 1 Hen. & M. (Va., 1808), 476; *Key v. Holloway*, 7 Baxt. (Tenn.) 575, 1 Am. Prob. R. 360, 366.

⁴ See note 1, p. 151.

§ 110. **Mode of proving that the testator was intoxicated when he made his will, or that he was an habitual drunkard.**—Any witness who knows the testator may, though he is not an expert, testify that he was intoxicated upon a certain date.¹ In testifying to the intoxication of the testator the witness is merely stating his opinion as to his condition; but his evidence is not, for this reason, to be rejected, as the subject is one upon which any intelligent person is competent to form an opinion. The proof of intoxication is most valuable when it refers solely to the time of the execution of the will. The object of the evidence of intoxication is to show that his mental capacity was so far weakened or destroyed by drink that at the date of execution he did not possess testamentary capacity or that his mind was then under an undue and improper influence.² But evidence of intoxication on other dates is not irrelevant, particularly if it appears that the testator was addicted to the habitual use of intoxicants.

Where the testator is alleged to have been drunk at the time he executed the will, it is admissible to prove his conduct upon previous occasions when he was under the influence of drink, to illustrate his usual manner of acting when intoxicated. A witness will not be allowed to state that in his opinion the testator was so drunk at the date of execution as not to be capable of making a valid will, or to give his opinion that he was unduly influenced in the making of his will by reason of intoxication. These are questions for the jury. The fact that the testator is an habitual drunkard may be proved by the evidence of his commitment as such, with proof that he has not adopted reformed habits of living. A witness may testify that in his opinion the testator was an habitual drunkard, though his habitual drunkenness has never been judicially determined.³

¹ This is the rule in criminal cases, and is believed to be equally applicable where the issue of intoxication arises in the probate of a will. *People v. Martin*, 36 N. Y. Supp. 437; *Gallagher v. People*, 120 Ill. 179; *Smith v. State*, 55 Ala. 1. And see also *Underhill on Crim. Evi.*, § 167; *United Brethren M. Aid Ins. Co. v. O'Hara*, 120 Pa. St. 256, 13 Atl. R. 932.

² *Peck v. Cary*, 27 N. Y. 9.

³ *Hopkins v. Bowers*, 111 N. C. 175; *Moore v. State*, 7 Tex. App. 608. The question, "State whether or not the testator when you saw him was intoxicated?" is not objectionable as a leading question. *Woolheather v. Risley*, 38 Iowa, 486.

The fact that the testator had an opportunity to procure liquor, or that he had it in his possession, is relevant; but his intoxication at any particular point of time cannot be inferred from the fact that at that time he had intoxicating liquors in his possession.¹

§ 111. **The effect of the use of morphine and similar drugs by testator.**—The same general rules are applicable to determining the testamentary capacity of a person who is addicted to the excessive and habitual use of morphine, cocaine or similar drugs as in the case of the habitual use of intoxicating liquors. The mere fact that the testator had been accustomed to take morphine or any similar drug, in reasonable amounts for a period more or less lengthy, for the purpose of relieving pain, will not invalidate a will made when he was not under the influence of the drug.² This is so though the use of morphine has been long continued, and has resulted in producing odd and peculiar actions or insane delusions upon the part of the deceased, provided the delusions do not affect the will. So the fact that the testator was on his death-bed and suffering severe pain, to alleviate which morphine was administered in reasonable quantities under the direction of physicians, will not invalidate a will then made unless it shall appear either *that he was unconscious*, or that the drug so affected his mental powers that *he was not capable of knowing or understanding the nature of the testamentary act*.³ Evidence of the use of morphine by the testator may be relevant upon the question of undue influence. If an invalid who is addicted to the habitual use of morphine is dependent for his supply of the drug on those by whom he

¹ In *re Woolsey's Will*, 41 N. Y. 577 (1889), 12 Atl. R. 612; *Lowman's Will*, 23 N. Y. S. 1055; *Miller v. Oestrich*, 27 Atl. R. 742 (1893), 157 Pa. St. 264, 273; *Carlin v. Baird*, 13 S. W. R. 434 (Ky., 1890); *Bush v. Lisle*, 89 Ky. (1889), 393, 399; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. R. 772; *Epling v. Halton*, 121 Ill. 555, 558, 13 N. E. R. 242.

² In *re Glockner's Will*, 2 N. Y. S. 97; In *re Hamilton's Estate*, 4 Pa. Dist. R. 161, 16 Pa. Ct. R. 303; *Hildreth v. Marshall*, 51 N. J. Eq. 251, 27 Atl. R. 465.

³ *Frost v. Wheeler*, 43 N. J. Eq. 573,

is continually surrounded, it may be reasonable to assume, such is the debilitating effect of this drug upon the volition, that he would do everything they required him to do, even to making a will in their favor, in order to prevent them from depriving him of the drug or restraining his use of it.¹

§ 112. Proof of epilepsy to disprove testamentary capacity.—The importance of proof that the deceased was subject to epileptic fits depends wholly on the proximity of the fit to the time of the execution of the will. It certainly requires no professional knowledge to affirm that no one possesses testamentary capacity during the actual paroxysm of an epileptic seizure. The mind of the patient is wholly overcome by the violence of the spasm. He has no control of his physical powers, and his signature or mark affixed to a writing while in this condition would conclusively be presumed not to be his voluntary mental act. The unconsciousness caused by the fit is usually temporary, its length depending upon the degree in which the physical constitution of the patient has succumbed to the disease. The paroxysm is usually succeeded by a period of extreme physical exhaustion and mental weakness extending over two or perhaps three days. The patient then usually regains his normal condition, which continues until his subsequent seizure by a similar spasm. The fact that the testator has had an epileptic seizure raises no presumption of continuing incapacity. The fact may be proved for what it is worth. And proof of epilepsy does not cast the burden of proving a lucid interval upon the proponent, for, after the convulsion with its attendant weakness has subsided, the mind is usually restored, to outward appearances at least, to its former normal condition.² And it may be shown in evidence that after his recovery the deceased continued to transact his ordinary business as usual.

§ 113. The testamentary capacity of idiots and imbeciles. The early writers upon the subject of testamentary law laid down the rule, in terms of the widest meaning, that an idiot

¹ *Bush v. Lisle*, 89 Ky. 393, 399.

27 N. Y. S. 649, 651, 7 Misc. R. 220; In

² *Round's Will*, 25 Misc. R. 101, 54 N. Y. S. 710; In *re Flansburgh's Will*, 82 Hun, 49, 31 N. Y. S. 177, 178; In *re Brizzee*, *id.*; In *re Johnson's Will*,

re Rapplee's Will, 21 N. Y. S. 801, 803, 66 Hun, 558; *Brown v. Riggan*, 94 Ill. 560; *Godden v. Burke*, 35 La. Ann. 160; *Foot v. Stanton*, 1 Deane, 19.

could not make a valid will.¹ These writers enunciate some fanciful rules by which the question whether a man is an idiot may be tested. Thus, it is said that if one does not know his own age he is an idiot, while on the other hand, if he can count up to twenty, or if he can measure cloth, or if he can tell his own name, or enumerate the days of the week, he is not an idiot. Ignorance of such facts is doubtless strong evidence of the existence of a low degree of understanding, but it is by no means conclusive of idiocy. It is within the experience of almost every person to meet those who cannot tell their own age, and it is conceivable that a man who is possessed of much shrewdness, and of a capacity to manage simple affairs, might not be able to measure cloth. The truth of the matter is that no universal rule exists which will determine in every case whether one is or is not an idiot. To define an idiot is impossible, and usually unnecessary. So far as testamentary capacity is concerned, the question is not so much Was the man an idiot? as Did he, upon all the facts and circumstances of the particular case, possess the mental capacity to make the will that he is alleged to have made?

The inquiry is, Did the testator, when he made the will, possess sufficient capacity to remember and hold in mind the details of the property he intended to dispose of, and to consider the claims of those who are the legitimate objects of his bounty? In the case of a very small estate, a testator having no near relations may be able to do this, and yet he may possess a very limited degree of intelligence. But in the case of an extensive estate, disposed of in a will containing intricate provisions, and which is executed by a testator of a mean understanding, the conviction would arise almost irresistibly that the will was not the outcome of his mind, but that he had been directed and controlled by others possessing more intelligence than he.²

¹ Swinb., pt. 2, sec. 14, p. 80; Co. Lit. 42; 4 Black. Com. 496. And in Shep. Touch., on page 403, it is said: "So also an idiot, i. e., such a one as cannot number twenty, or tell what age he is, or the like, cannot make a testament, or dispose of his lands or goods; and albeit he do make a wise, reasonable and sensible testament, yet is the testament void. But such a one as is of a mean understanding only, that hath *grossum caput*, and is of the middle sort between a wise man and a fool, is not prohibited to make a testament."

² "Idiocy is that condition of the

Excessive stupidity, gross ignorance and extreme mental weakness are never enough alone to invalidate a will. They should receive due and careful attention upon the issue of testamentary capacity, and, joined with other circumstances, may raise the presumption that the paper presented as a will is the result of undue influence. But the question, Was the testator an idiot? is always one of fact, to be determined according to the facts and circumstances of the case, always keeping in view the past history of the physical and mental condition of the person.¹

The ability of the testator to transact ordinary business, and the fact that he did transact such business, are always evidence of testamentary capacity. These facts are of a great deal more value and weight where the testator is alleged to have been an idiot than where insanity is in issue, for a lunatic may carry on extensive business transactions without displaying any signs of mental unsoundness, but it cannot be said with truth that an idiot, in the common meaning of the term, can carry on any business at all.²

mind in which the reflective, and all or a part of the affective, powers are either entirely wanting, or are manifested to the slightest possible extent. In reasoning power many idiots are below the brutes. Unable to compare two ideas together, nothing leads them to act but the faint impressions of the moment, and these are often insufficient to induce them to gratify even their instinctive wants." Ray's Medical Jurisprudence of Insanity, § 54.

¹Duffield v. Morris, 2 Harr. (Del.) 379; Cordrey v. Cordrey, 1 Houst. (Del.) 269, 271; Kinne v. Kinne, 9 Conn. 102; Potts v. House, 6 Ga. 324, 326; In re Voorhis, 56 Hun, 641, 9 N. Y. Supp. 201; Moore v. Moore, 2 Bradf. (N. Y.) 261, 267; Howell v. Taylor, 50 N. J. Eq. 428, 26 Atl. R. 566; Delafield v. Parish, 25 N. Y. 9, 29; Converse v. Converse, 21 Vt. 168; Dyer, 143b; 1 Black. Com., p. 303.

²Bannatyne v. Bannatyne, 14 Eng. L. & Eq. 581, 590, 591. In this very

celebrated case it appeared that the deceased kept a bank account for a period of four years, drawing drafts from time to time, and receiving the money himself at the bank. He came to the bank unaccompanied, stated the amount he needed, which was written in by a clerk, signed the check, and placed the money in his pocket. "Surely," says the court, "no idiot could have done this, for he must have exercised thought to go to the bank, memory and judgment as to the sum required; and moreover, his conduct and demeanor could not at such times have been as described by the witnesses against the will, or from the glaring colors in which the imbecility has been depicted it must have been discovered, and the business could never have been transacted at all." And the court also remarks on page 590: "Before entering on this branch of the case I must bear in mind what the nature of the case set up in opposi-

§ 114. **The testamentary capacity of aged persons — Their wills regarded with favor by the law.**— The courts are inclined to favor the validity of the wills of aged testators. Old age is not always attractive to those with whom the aged one is brought in contact. *He* has, to a certain extent, lost, or never acquired, an active interest in the things of the present; and his mind dwells with pleasure solely upon the pictures of the past which his memory or his fancy delineates. If the aged man is garrulous, as frequently happens, he will institute audible and unfavorable comparisons between what to him appears the degenerated condition of the present, and the more enlightened and progressive condition of the past. The old man is conservative, and not unfrequently labors under the erroneous impression that length of years and experience have given him a larger degree of wisdom than he in fact possesses. He fondly imagines himself fully competent to point out to the generation by which he is surrounded the folly and inutility of much that it esteems of the highest value. If he is weak or ill he soon becomes querulous, and imagines himself neglected by those to whom he has a right to look for attention, but whose interests are in the affairs of the present.

In short, he becomes a bore to all who are about him. Under these circumstances it lies in human nature to forget the precepts which admonish us to respect and protect the aged, and the old person is apt to be left solitary and alone by his contemporaries, who have, not without some reason, lost interest in him and his affairs. What he cannot, in such case, secure from the respect and affection of others, he may receive be-

tion to the will is. I must repeat that it is not lunacy; it is not monomania; it is not any species of mental disorder, the symptoms of which it may at periods be difficult to detect; but the case presented is that of idiocy or imbecility, the characteristic of which is permanence, with little or no variation, though often in the case of idiots it does sometimes happen that there will be a greater degree of excitement demonstrated than at other periods. How is such a case to be met? I

apprehend, to meet it, and to show that such a state of things did not exist at any given period, proof of acts of business are most important evidence. Many acts of business could possibly be done by a lunatic, and the lunacy not detected: but it is scarcely possible to predicate the same of an idiot or imbecile person. I shall look, therefore, in the first instance, to the acts of business." See also *Moore v. Moore*, 2 Bradf. (N. Y.) 261, 279.

cause of the powerful motive of self-interest, which, to a greater or less degree, actuates every human breast. And the power of making a testamentary disposition of his property for the benefit of those who care for him and who fill his declining years with care and comfort is then a most efficient means of procuring the care and attention which his physical infirmities demand. For this reason the wills of aged persons are favored by the law, where it is shown that they were not fraudulently procured, and where they are such as it is natural to expect under the circumstances.¹

§ 115. Loss of memory caused by old age as indicating lack of capacity.—The law requires that the testator shall be of sound and disposing memory. He must be able to recall and remember the principal particulars of his property; its character, and oftentimes its situation; and he must at the same time be able to retain in mind the names of those persons whom he wishes to be the objects of his bounty. He need not know nor be able to recall all the details, value and situation of a large and extensive estate, nor need he be able to enumerate, if called upon, the name of every person who is more or less remotely related to him, or who may have expectations from him. It is never required that the testator's memory shall be perfect; for if such were the rule, few persons, particularly in case they are possessed of ample fortune, and have numerous relations, would be able to make wills at all.

But it is well known that the decay or loss of memory is one of the first indications, if not in fact the first sign, of approaching old age. The memory weakens first in the direction of recently-acquired facts. It appears to be unable to retain the names of persons with whom the testator has been brought re-

¹ Van Alst v. Hunter, 5 Johns. Ch. (N. Y.) 148; Lennig's Estate, 36 W. N. C. 118, 119; In re Humphrey, 26 N. J. Eq. 513, 518. "The power of devising is a legal incident to ownership, and its full enjoyment is one of the most sacred rights of property. It gives encouragement to industry. It stimulates accumulation. It furnishes new motives to the love of the parent, and increases the strength of parental authority. It adds new in-

centives to obedience to the child, and provides additional assurances against his misconduct or ingratitude. By extending the power of the present generation over the next, it enables old age to command kindness and respect, and strengthens the ties which bind it to youth." By Appleton, J., in Deering v. Adams, 37 Me. 264, 269. See also 6 L. R. A. 167.

cently in contact, and the dates and particulars of recent events. On the other hand, in the case of an old person, the incidents of earlier days, the long-forgotten happenings of youth and childhood, are frequently recalled, and are confounded with those of the present. The aged person fails to recognize those who surround him, or identifies them with persons long since deceased. As the scenes of his youth and early manhood recur to his mind, he becomes fond of describing them to others, to the exclusion of the incidents of his present life. The garrulity of old age prompts him to dwell at length upon the trivial events of his early life, and this propensity very frequently produces the impression that he is suffering from a greater degree of mental decay than is actually the case. The habit of relating stories of one's childhood; a lively interest in things of one's younger years, while commonly to be found in aged persons, may be consistent with a high degree of capacity, for the mind, when necessary, will turn completely from these subjects to the important affairs of the present. The loss of memory does not in every case follow the same course. Some persons, as they grow old, lose their memory by almost imperceptible degrees; others lose their memory at once, or very rapidly. In the case of some, the whole memory seems to go; while others lose it simply as regards certain classes of events,—as, for example, those which are most remote, retaining a good intellectual grasp upon facts and occurrences which approximate them more closely in point of time. This latter class are usually able to attend to their business affairs and to engage in ordinary occupations. But usually this degeneration of the memory, whether rapid or the contrary, is progressive until the memory is entirely gone; then recent events, as well as those more remote, no longer impress the mind, and the aged person verges into second childhood.

§ 116. **Manner of decay of memory in old age.**—The failure of memory begins in different persons at different ages. Much depends upon the surroundings, the mental training, the previous life and the physical health and condition of the person. One man may have wholly lost his memory at an age when another is in the prime of his intellectual activity. No line can be marked to indicate at what age the testamentary power and the disposing memory disappear.

Another fact very frequently observed in the case of aged persons requires attention. The intellectual powers of a person advanced in years are sometimes observed to take on new strength and vigor, and where it is natural for us to look for a dullness of intellect and a weakness of memory, we find instead a shrewdness and an increased power to retain facts. The fact that some loss of memory does not of necessity destroy capacity should be emphasized.¹ If this were so, it is probable that every will would be open to attack. No man has a memory equally retentive as to all facts which come within his mental reach, even in his intellectual prime. Some remember dates and names and faces with ease, while others do not. Others have a retentive memory for abstract principles, but weak as to concrete facts. The tendency of the memory to weakness is accentuated by the approach of old age and the decay of the mental and physical powers. Hence it is important to consider the direction in which the lack of recollection manifests itself. Failure of memory, in order to constitute testamentary incapacity, must either be total, depriving the sufferer of all his rational faculties, or, if it is partial, it must relate to those facts regarding his property and family which he must take into consideration in making a will. Thus, we will take the case of a successful business man accustomed for years to the transaction of his affairs, but whose memory is beginning

¹ *Henry v. Hall*, 17 S. R. 187, 191, 106 Ala. 84; *McCullough v. Campbell*, 49 Ark. 492, 493; *Comstock v. Hadlyme*, 8 Conn. 254, 264 (1830); *Kinne v. Kinne*, 9 Conn. (1831), 101, 103, 105; *Taylor v. Pegram*, 151 Ill. 106, 119, 37 N. E. R. 837; *Greene v. Greene*, 145 Ill. 264, 275 (1893), 33 N. E. R. 941; *Francis v. Wilkinson*, 147 Ill. 370; *Yoe v. McCord*, 74 Ill. (1874), 33; *Prentice v. Bates*, 88 Mich. 567, 50 N. W. R. 637; *Bush v. Delano* (Mich., 1897), 71 N. W. R. 628; *Hiss v. Weik*, 78 Md. 439, 447; *White v. Starr*, 47 N. J. Eq. 244, 20 Atl. R. 875; *Den v. Van Cleve*, 5 N. J. L. 589, 660; *Cornwell v. Riker*, 2 Dem. Sur. 354, 377; *In re Stewart's Will*, 59 Hun, 618; *In re Clearwater*, 2 N. Y. S. 99; *Moore v. Moore*, 2 Bradf. (N. Y.) 261; *Bleecker v. Lynch*, 1 id. 458, 467; *Children's Aid Soc. v. Loveridge*, 70 N. Y. (1877), 387; *Mairs v. Freeman*, 1 Redf. (N. Y.) 181, 207; *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y., 1820), 160; *In re Henry's Will*, 41 N. Y. S. 1096, 18 Misc. R. 149; *Bain v. Cline*, 24 Oreg. 175, 33 Pac. R. 542; *Chrisman v. Chrisman*, 16 Oreg. (1889), 127, 138, 141; *Loeser's Estate*, 167 Pa. St. 498, 499, 35 W. N. C. 543; *Shreiner v. Shreiner* (Pa., 1897), 35 Atl. R. 974; *Napfle's Estate*, 134 Pa. St. 492, 493; *Wilson v. Mitchell*, 101 Pa. St. 495, 503; *Thompson v. Kyner*, 65 Pa. St. 368; *Fow's Estate*, 147 Pa. St. 264, 266; *Kirkwood v. Gordon*, 7 Rich. L. (S. C.) 474, 480.

to fail. It is material to show that he, while retaining memory and understanding sufficient to continue to carry on business properly, had a very weak memory in other respects, and forgot the names and faces of his old friends and acquaintances. That evidence may be and often is material, but only so far as it furnishes a basis to show the loss of memory in one direction by showing its loss in another. The true object of the inquiry into lost memory is to ascertain how far this faculty of the understanding has lost its original strength and vigor *as regards those facts of the personal history of the testator, and of his relations and property, which enter into and form a part of the planning and execution of a rational, fair and just testament.* If a memory for these is absent, it is immaterial how retentive the memory of the testator was as to other facts; while if this is shown to exist, his inability to recall other facts and circumstances, while always relevant, is of minor importance.

The fact that an aged testator had, at a period not too remote from the execution of the will, attended to his business affairs is always material. It may be shown that he was active in business, that he made contracts, paid bills, received money and attended to the details of his daily avocation.¹ Thus, a will ought to be admitted to probate where it appears that the testatrix, although over eighty years old, feeble and somewhat blind, talked intelligently about her business affairs, remembered the value of her property and the manner in which it was invested, objected to a reduction in the rate of interest paid, took part in the routine of the household, paid bills and conversed with visitors she knew.²

¹ In re Soule's Will, 1 Con. Sur. 18, 22 A. N. C. 236, 3 N. Y. Supp. 259; In re Cox's Estate, 31 Atl. R. 747, 167 Pa. St. 501; McFadin v. Catron, 120 Mo. 252, 25 S. W. R. 506; Keating's Appeal (Pa., 1889), 17 Atl. R. 207; In re Skuats, 26 N. Y. Supp. 494, 74 Hun, 462; Maddox v. Maddox, 114 Mo. 35, 21 S. W. R. 499; In re Vedder, 6 Dem. Sur. 92; Bain v. Cline, 24 Oreg. 175, 33 Pac. R. 542.

² Waddington v. Buzby, 45 N. J. Eq. 173, 16 Atl. R. 690. In a very recent case in the state of Illinois an instruc-

tion as follows was affirmed as correctly stating the law: "If the testator had become so enfeebled in mind as to be incapable of acting rationally in the ordinary affairs of life, and incapable of rationally transacting ordinary business affairs to which he had been theretofore accustomed, and to such an extent that he could not remember from hour to hour, or from day to day, what he had said or done, or intended to say or do, and his mental faculties had become so impaired that it would be unsafe to

§ 117. Incapacity when arising from extreme old age.—

The cases in which the advanced age of the testator has been urged as a circumstance impairing his capacity to make a will are extremely numerous. It is, moreover, in the highest degree probable that this will continue to be a mooted point and a fertile source of litigation because of the utter impossibility of formulating a rule which shall be universally applicable to the varying circumstances of the cases. It is safe to say that *old age alone, no matter how great, never did and cannot validate a will, if from all the evidence it appears that the testator had sufficient capacity.* Old age is a circumstance to be considered. But old age is never conclusive. The presumption of competency is not destroyed by an extremity of age, though it may be weakened where the testator is very old and other circumstances are proved; but taken alone it matters not that the testator was one hundred years old at the time of the execution of the will.¹ The question in every case is, Did the testator, no matter what his age, have sufficient mental capacity to recall to mind, to retain there and to understand the matter in hand, and did he comprehend the claims of those who were bound to him by nature?²

intrust to him the discharge of the simple affairs of life, and his memory had so far failed that he could not remember his relations to others, and such mental condition had continued to the execution of the paper purporting to be his will, then the jury should find that he was not of sound mind and memory." *Green v. Green*, 33 N. E. R. 941, 145 Ill. 264.

¹ *Brown v. Molliston*, 3 Whart. (Pa.) 129.

² *Kinne v. Kinne*, 9 Conn. 102, 104; *Richmond's Appeal*, 59 Conn. 226, 22 Atl. R. 82; *Potts v. House*, 6 Ga. 324, 327; *Carpenter v. Calvert*, 83 Ill. 62; *Pooler v. Christman*, 145 Ill. 405, 84 N. E. R. 57 (eighty-six years old); *Muir v. Miller*, 72 Iowa, 585, 590; *Manatt v. Scott* (Iowa, 1898), 76 N. W. R. 717; *Hudson v. Hughes*, 56 Kan. 152, 161; *Watson v. Watson*, 2 B. Mon. (Ky.) 74; *Reed's Will*, 2 B. Mon. (Ky.)

79; *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Minor v. Thomas*, 12 B. Mon. (Ky.) 106 (testator ninety years old); *Higgins v. Carlton*, 28 Md. 115; *Hall v. Perry*, 87 Me. 569, 572; *Thomas v. Stump*, 62 Mo. 275; *Whitney v. Twombly*, 136 Mass. 145, 147; *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. R. 105; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. R. 506 (eighty-three years old); *Hegney v. Head*, 126 Mo. 619, 29 S. W. R. 587 (eighty years old); *Thompson v. Ish*, 99 Mo. 166, 12 S. W. R. 510; *Riley v. Sherwood*, 45 S. W. R. 1077 (Mo., 1898); *Von de Veld v. Judy*, 44 S. W. R. 1117 (Mo., 1898); *Sloan v. Maxwell*, 3 N. J. Eq. 563, 581; *Lowe v. Williamson*, 2 N. J. Eq. 82; *Clifton v. Clifton*, 47 N. J. Eq. 227, 21 Atl. R. 333 (eighty-three years old); *Collins v. Townley*, 21 N. J. Eq. 353 (ninety-eight years old); *In re Carver*, 23 N. Y. Supp. 753,

§ 118. **The testamentary capacity of blind persons.**—Total blindness *per se* and defective vision do not destroy testamentary capacity. The civil law, as administered by the ecclesiastical judges in England, required that one who offered for probate the will of a person known to have been blind must show that the writing had been read to him, and that it had been adopted by him as his last will and testament in the presence of two of all the witnesses whose names are subscribed to it.¹ Our law does not go so far as this. It is never necessary, either in the case of an illiterate testator or of one whose vision is defective, that an actual reading of the will to him in the presence of witnesses should be shown. It is sufficient if it shall appear by satisfactory evidence that the testator, who

3 Misc. R. 567; In re Otis, 22 N. Y. Supp. 1060; Bleecker v. Lynch, 1 Bradf. (N. Y.) 458; Van Alst v. Hunter, 5 Johns. Ch. (N. Y.) 148, 158; Mowry v. Silber, 2 Bradf. (N. Y.) 133; Horn v. Pullman, 72 N. Y. 269, 10 Hun, 473; Children's Aid Soc. v. Loveridge, 70 N. Y. 287; Forman v. Smith, 7 Lans. (N. Y.) 443; In re Harris, 44 N. Y. Supp. 341; In re Jones, 25 N. Y. Supp. 109, 5 Misc. R. 199; In re Snelling's Will, 63 Hun, 627, 17 N. Y. Supp. 693, 32 N. E. R. 1006, 136 N. Y. 515; In re Gray's Will, 52 Hun, 614, 5 N. Y. Supp. 464 (ninety years old); In re Totten's Will, 3 N. Y. Supp. 153, 50 Hun, 606 (eighty-nine years old); In re Soule's Will, 1 Con. Sur. 18, 22 Abb. N. C. 236, 3 N. Y. Supp. 259 (ninety-two years old); In re Berrien's Will, 53 Hun, 610 (eighty-three years old); In re Bartholick's Will, 5 N. Y. Supp. 842 (eighty-two years old); Cornwell v. Riker, 2 Dem. Sur. (N. Y.) 354, 375; Clark v. Fisher, 1 Paige (N. Y.), 171; Creeley v. Ostrander, 3 Bradf. (N. Y.) 107; Crolius v. Stark, 64 Barb. (N. Y.) 112; McKim's Estate, 9 Pa. Co. Ct. R. 209; In re Tallman's Will, 148 Pa. St. 286, 23 Atl. R. 986; Daniel v. Daniel, 39 Pa. St. 191; Thompson v. Kyner, 65 Pa. St. 368, 378; Fow's Estate, 147 Pa. St. 264, 23 Atl. R. 447 (eighty years of age); Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. R. 493; In re Silverthorn's Estate, 68 Wis. 372, 377; Kirkwood v. Gordon, 7 Rich. (S. C.) L. 474, 481; In re Cline, 24 Oreg. 175, 178; Chrisman v. Chrisman, 16 Oreg. 127, 18 Pac. R. 6. "The advanced age of the testator, upwards of eighty years, was made a distinct point against the will, not indeed as rendering him incapable, so much as raising a presumption of incompetency. The power of making a valid will is not impaired by the access of old age, nor is it denied to him who has attained the utmost verge of human life, on that account alone. Three score years and ten do not always or necessarily extinguish the light of reason. It is then in some men more brilliant than it is in others at a much earlier age. The power of disposing of property is an inestimable privilege of the old. It frequently commands attention and respect when other motives have ceased to influence. How often without it would the hoary head be neglected, deserted and despised." By the court by Ewing, Judge, in Sloan v. Maxwell, 3 N. J. Eq. 563, on p. 581.

¹ Swinburne, pt. 2, sec. 11; Godolphin, pt. 1, ch. 11.

was unable to read his will, has been made acquainted with its contents by any proper means. The burden of proof to show this knowledge of the contents of the will upon the part of a testator who is blind is upon the party who offers it for probate. He may show that fact by any proper evidence, and the testimony of the subscribing witness upon this point is not the only evidence. And if it appear from all the evidence that the testator possessed testamentary capacity, and that he knew the contents of the paper purporting to be his will, and that he approved of it, the instrument should be admitted to probate.¹

The inability of the deceased to read the instrument which purports to be his last will, whether attributable to his blindness or to his illiteracy, though it does not deprive him of testamentary capacity, and though, under modern rules, it is of very slight importance in determining whether he possesses such capacity, is in the highest degree material upon the issue of fraud or undue influence alleged to have been employed in procuring the execution of the will. In proportion as the deceased is deprived, by his physical or mental infirmities, of the ordinary facilities for acquiring a knowledge of the contents of the writing which he executes, he is subject to the practice of deception by those who surround him at the time of execution. Abundant opportunities for the practice of fraud and imposition exist in the case of a blind testator. He may have given instructions for a will to a person upon whom he can rely, and the latter may have implicitly obeyed the directions thus given, and another paper may have been subsequently substituted by interested persons in the place of that which has been drawn. So the person whom he has instructed to frame his will may have intentionally diverged from his instructions, and the testator, unless the will shall be read to him when complete, has no means of correcting any errors which may have arisen. The blind or the illiterate testator is completely at the mercy of those who are about him when he executes his will. If they are interested persons, or if they receive benefits under the will, the court should, when it is not conclusively shown that the will was actually read to him prior to its execution, require a high degree of proof that he was acquainted with its contents,

¹ See *post*, § 141. Knowledge of contents of will.

understood its meaning, and that the paper writing presented for probate as his will correctly represents his final testamentary intentions. In every case clear proof must be given that no imposition has been employed.¹

§ 119. **The testamentary capacity of deaf mutes.**—The common law, in the time of Lord Coke,² absolutely denied the possession of testamentary capacity to one who had been deaf and dumb from his nativity. Nor was this rule of law, however contrary it may be to the more enlightened ideas of the present age, without a sound basis in reason and sense. The inadequacy of the facilities for obtaining an education, even of the most elementary character, in ancient times, was a clog upon the development of intelligence, even among those who possessed the powers of speech and hearing. But in addition to this, no adequate system for the instruction of deaf mutes had been devised, and these unfortunate persons, to whom the main avenues for acquiring knowledge were closed from their infancy, were permitted to grow up to maturity in a condition but little removed from absolute imbecility. If, however, a man, who had acquired some degree of intelligence by the employment of the faculties with which he had been endowed

¹ *Guthrie v. Price*, 23 Ark. 396 (1861); 415; *Mitchell v. Thomas*, 6 Moore, P. C. 187. In the English case of *Edwards v. Fincham*, 3 Curteis, 63, on page 73, the court said: "Certainly when the court is asked to grant probate of a will of a party totally or almost blind, it must be shown to the satisfaction of the court that the contents of the will are conformable to the instructions and intentions of the deceased. Undoubtedly in this case the will is not proved to have been read over to the deceased. A reference is made to Mr. Williams' Treatise (holding that a reading is necessary), but the case of *Barton v. Roberts*, 3 Phillimore, 455, n., shows that it is not necessary that the actual will should have been read over, if there is proof that the party deceased knew the contents of it."

² *Co. Lit.* 42b.

³ *Davis v. Rogers*, 1 *Houst. (Del.)* 44; *Clifton v. Murray*, 7 Ga. 564; *Martin v. Mitchell*, 23 Ga. 382 (1859); *Wampler v. Wampler*, 9 Md. (1856), 540, 550; *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. R. 105; *Waddington v. Buzby*, 45 N. J. Eq. 173, 16 Atl. R. 690; *Patton v. Hope*, 37 N. J. Eq. 522, 527; *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 69, 142; *In re Berrien's Will*, 58 Hun, 610, 12 N. Y. Supp. 585, 589; *In re Lansing*, 49 Hun, 610, 2 N. Y. Supp. 117, 118; *Collins v. Osborn*, 84 N. J. Eq. 511, 522; *Wilson v. Mitchell*, 101 Pa. St. 495, 505; *Ray v. Hill*, 3 Strobh. (N. C.) 297, 300, 302; *Carr v. McCann*, 1 D. & Bat. (N. C.) 276; *Lewis v. Lewis*, 6 S. & R. (Pa., 1821), 489; *Harrison v. Rowan*, 3 Wash. C. C. 580, 584; *Moore v. Paine*, 2 Cas. temp. Lee, 575; *Edwards v. Fincham*, 3 Curt. 63, 7 Jur. 25; *Longchamp v. Fish*, 2 B. & P. N. R.

at his birth, became a deaf mute by accident, he was not deprived of testamentary capacity. He might execute a will by signs, or by writing if he complied with the customary formalities.¹ The law as it stands at the present day makes no distinction, so far as testamentary capacity is concerned, between those who are deaf and dumb from their birth and those who subsequently become so.

Education in modern times has done much to alleviate the condition of both classes of deaf mutes. It has been shown beyond cavil that by patience and proper methods of instruction the mental power, even of those who are not only deaf mutes but afflicted with blindness as well, can be developed in the highest degree. Such being the case, no reason now exists for any presumption of incapacity springing out of an inability to understand or to employ spoken language. The fact that a testator is a deaf mute may be considered in determining his testamentary capacity. It is never controlling, and is usually of very slight importance upon this question, if it shall appear that the deaf mute has received an ordinary education and can read and write with a fair degree of ability. If it appears from all the evidence that the testator, though a deaf mute, possessed sufficient testamentary capacity, and that the instrument offered for probate expresses his wishes as regards the disposition of his property after death, it must be admitted to probate as his will.

A man who was not only deaf and dumb, but blind as well, was conclusively presumed by the common law to be devoid of understanding, and absolutely without testamentary capacity.² It has been discovered, however, by those who have made a science of the education of deaf mutes, that a person who is blind and deaf and dumb is capable of attaining a high degree of mental cultivation, provided proper methods are employed

¹ "A man that is both deaf and dumb, and that is so by nature, cannot make a testament. But a man that is so by accident may by writing or signs make a testament. And so may a man that is deaf and dumb by nature or accident. And so may a man that is blind." Shep. Touch. 408.

² Shep. Touch. 408. And Blackstone says (1 Com. 304): "But a man who is born deaf, dumb and blind is looked upon by the law as in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas."

in his instruction. There is nothing, therefore, in the unfortunate condition of those persons to deprive them of the capacity to make wills, though of course all the facts of their unfortunate condition are relevant and ought to receive consideration upon the issue of testamentary capacity.¹ The court to which the will of a deaf mute is offered for probate may require proof of the signs and motions used by the testator in communicating his intentions. If he employed signs, they must be fully described and explained. The proof must be clear, and must convince that he understood and approved the provisions of the instrument which is offered as his will.²

§ 120. **The testamentary capacity of infants.**—Lord Coke lays it down as an established rule of the common law that an infant of the age of eighteen may execute a valid will of personalty, though no infant under the age of twenty-one had capacity to devise lands.³ But the rules which were recognized in the English ecclesiastical courts, where wills of personal property were probated, were different. The rule of the civil law that infants who had attained the age of fourteen, if males, and twelve, if females, had capacity to execute wills of personal property, was adopted in these courts. The judgment of the probate court admitting the will to probate being conclusive as to the capacity of the testator, the rule of the civil law was agreed to, if not affirmed, by the courts of common law and in the jurisdiction of the chancellor.⁴ An early writer⁵ says that no custom is good by which an infant under the above ages has power to make a will. As soon as the infant shall attain the proper age, he may make a will without or against the consent of the parent or guardian; and the infant is of the age to make a will at any and all times during the last day of the twelfth or fourteenth year, as the case may be. After the

¹ *Yong v. Sant*, Dyer, 56a. And see 255; *Herbert v. Torball*, 1 Siderfin, 162; *Hyde v. Hyde*, Prec. Ch. 816; *Brown v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *Christmas v. Mitchell*, 3 Ired. (N. C.) Ch. 535, 542.

² *In re Owston*, 2 Sw. & Tr. 461, 463-465; *In re Geale*, 3 Sw. & Tr. 431, 435; 33 L. J. Pr. 125. And see *Per-rine's Case*, 41 N. J. Eq. 411.

³ Co. Lit. 89b. n. 83.

⁴ *Bishop v. Sharp* (1704), 2 Vern. 469; *Barlow v. Grant* (1684), 1 Vern.

Co. Lit. 89b.

⁵ *Swinburne*, p. 74.

infant has completed the proper age he may ratify a will made during minority, and by this express republication the former will is ratified and approved. On the other hand, the fact alone that an infant survives for some time the date upon which he acquires testamentary capacity does not, without a republication, set up as valid a will made when he had no capacity.¹

In England, by statute,² any father, whether under or over the age of twenty-one, had power, by will or deed, to appoint a guardian for his infant child. And guardians appointed by virtue of the power conferred by this statute possess the right to the custody of the ward's person and of his property, both real and personal. Similar statutes exist in many of the states of the American union.³ And now in England⁴ no person under the age of twenty-one years can execute a valid will of personal property unless, at the time of the execution, he was a sailor or soldier in actual service; *i. e.*, either upon an expedition if he were a soldier, or actually at sea if a sailor.⁵

§ 121. **The testamentary capacity of married women at the common law.**—In considering the testamentary capacity of married women to devise their lands prior to the enactment of modern statutes, it should, in the first place, be said that some doubts having arisen as to the application of the statute of wills,⁶ which empowered *every person* to devise lands, a statute was subsequently enacted⁷ expressly prohibiting devises by a married woman. She could not convey a legal title by devise, though with her husband's consent. But where lands were settled to her separate use with power of appointment, her appointment was valid in equity, not as a will, but as an appointment of the equitable interest under the statute of uses. A woman might, before her marriage, or afterwards with her husband's consent, settle lands to which she had title, or have land settled upon in such a way that she could devise it. She

¹ Whitmore v. Weld, 2 Ch. R. 383; *erty devised. Hearle v. Greenbanke*, Co. Lit. 896, n. 6; *Hinckley v. Sim-* 8 Atk. 897.
mins, 4 Ves. 160.

² 12 Car., c. 24, sec. 8.

³ It would seem that the incapacity arising from infancy cannot be dispensed with by the consent of the parties interested in the prop-

⁴ By 1 Vict., c. 26.

⁵ Drummond v. Parish, 3 Curt. 522.

⁶ 32 Henry VIII., c. 1.

⁷ 34 and 35 Henry VIII., c. 5, § 14.
See 1 Powell, Dev. 140; Dyer, 354;
2 Black. Com., p. 498.

might appoint either the legal or the equitable title, and the appointee took, not under the *quasi*-will, but under the original deed of settlement. In no case could a married woman devise real property unless by virtue of a power of appointment.¹ As regards personal property which a woman held as her separate estate, and where the interests of the husband alone were concerned, a married woman might dispose of that by her will as a consequence of the unlimited *jus disponendi* which attached to it, without her husband's consent and without any express power in her to dispose of the same by will.² And it was not regarded as material whether the personal property was settled in trustees to her separate use, or whether she held the legal title to it. And the consent of the husband, when required, could be given before as well as after marriage.³

¹ *Gore v. Knight*, 2 Vern. 535; *West v. West*, 3 Rand. (Va., 1825), 381; *Hodsdon v. Lloyd*, 2 Bro. C. C. 534; *Hickman v. Brown*, 88 Ky. 377, 11 S. W. R. 199; *Van Winkle v. Schoonmaker* (1862), 15 N. J. Eq. 384, 386; *Holman v. Perry*, 4 Met. 492, 497; *Dillard v. Dillard's Ex'rs* (Va., 1898), 21 S. E. R. 669; *In re Steinmetz Estate*, 168 Pa. St. 175, 31 Atl. R. 1092; *Burkett v. Whittemore*, 36 S. C. 428, 15 S. E. R. 616; 2 Story, Eq. Jur., § 1392; *Hood v. Archer*, 1 McCord (S. C., 1821), 225, 447; *Anderson v. Miller*, 6 J. J. Marsh. 578; *Cassel v. Vernon*, 5 Mason, C. C. (1829), 332; *Helms v. Franciscus*, 2 Bland (Md.), 544; *Peacock v. Monk*, 2 Vesey, 190, 191; *Rich v. Cockell*, 9 Ves. 369, 375; *Fettiplace v. Gorgas*, 1 Ves. Jr. 46, 49; *Grigby v. Cox*, 1 Ves. Sr. 517, 518. So where a married woman holds property as executrix. *Scammell v. Wilkinson*, 2 East, 557; *West v. West*, 3 Rand. (Va., 1825), 373, 375.

² 2 Vern. 298 (1692); *Herbert v. Herbert* (1692), Prec. Ch. 44; *Hearle v. Greenbanke*, 1 Ves. 298; *Bennett v. Davis*, 2 P. W. 316; *Graham v. Londonderry*, 3 Atk. 393; *Pride v. Bubh*, L. R. 7 Ch. Div. 64; *Bishop v. Wall*, 3 Ch. Div. 394; *Rich v. Cockell*, 9

Ves. 369; *Taylor v. Meade*, 4 D. J. & S. 597; *Osgood v. Breed*, 12 Mass. 525, 532; *Morse v. Thompson*, 4 Cush. (Mass., 1849), 562, 569; *Lee v. Bennett*, 31 Miss. 110, 126; *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384; 1 Sugden, Powers, 183 et seq.; *Rich v. Beaumont*, 3 Bro. P. C. 308. And see also *Peacock v. Monk*, 2 Ves. 191; *Churchill v. Dibben*, 2 Lord Keny. 68, 84 (1754); *Wright v. Cadagan*, 1 Bro. P. C. Toml. 486.

³ 1 Black. Com. 445; *George v. Bussing*, 15 B. Mon. (Ky.) 558; *Burroughs v. Nutting*, 105 Mass. 228, 229; *Osgood v. Breed*, 12 Mass. 525, 532; *Wagner's Estate*, 2 Ashm. 448; *Willock v. Noble*, L. R. 7 H. L. 580, 590, 597; *Ex parte Fane*, 16 Sim. 406; *Fisher v. Kimball*, 17 Vt. 323. The favor with which the courts of England regarded the heir caused them to distinguish between wills of real property and wills of personalty executed by married women, holding that a married woman could not, unless by an express power of appointment, devise freehold estate so as to bind her heir, but that she might bequeath estates less than freehold if her husband would consent. Sand. Uses (5th ed.), 384; 1 Chance, Powers,

Where the consent of the husband is required to a will of personal property by a married woman it need not be express.¹ His consent to the will may be inferred from the fact that it is in his writing,² or, when he knows of its execution, from his silence during the life of the wife; and once having consented, either expressly or by implication, he cannot revoke his consent either before or after her death.³ But some authorities hold that the consent of the husband may be withdrawn at any time before probate, unless where, because of the seeming assent of the husband, the rights of other persons have attached.⁴ Where the husband had been sent into exile or transported for crime, the wife possessed absolute power to act in every respect as a *feme sole*.⁵ But where a woman executed a will during coverture, the fact that she survives her husband does not alone validate the will unless she shall re-execute it.⁶ The savings out of an allowance made by a husband for the support of his wife living separate from him are treated as separate estate in equity and she may dispose of them by will;⁷ but not savings out of pin-money, which is an allowance for the apparel and personal adornment of the wife while she is living with the husband to support her in a proper position as becomes her husband's station in life, and in which he as much as she has an interest.⁸

§ 122. The consent of the husband, when required by statute.—In many of the states under the statutes conferring

206; 4 Coke, 61; Lee v. Bennett, 31 Miss. 119, 126.

¹ In re Cooper, L. R. 6 Prob. Div. 34; Cutter v. Butler, 25 N. H. 343, 358; Grimke v. Grimke, 1 Des. (S. C.) Eq. 366; Brook v. Turner, 2 Mod. 170, 172.

² Grimke v. Grimke, 1 Des. Eq. 366.

³ Brook v. Turner, 2 Mod. 170, 172; Maas v. Sheffield, 10 Jur. 417, 1 Rob. 364; Cutter v. Butler, 25 N. H. 343, 357; Rex v. Bettesworth, 2 Str. 891; Lee v. Bennett, 31 Miss. (1856), 119, 126; Jaques v. M. E. Church (1820), 17 Johns. (N. Y.) 549, 585; West v. West, Ex'r, 3 Rand. (Va., 1825), 373, 375, 376.

⁴ Van Winkle v. Schoonmaker, 15 N. J. Eq. 384, 387; 2 Swinb., p. 81;

Henley v. Phillips, 2 Atk. 49; 1 Roper, Husband & Wife, p. 170; 1 Williams, Ex'rs, 46, 47; George v. Bussing, 15 B. Mon. (Ky.) 558. At common law a consent to permit the execution of wills generally is not sufficient. It must be a consent to the particular will which is set up. Rex v. Bettesworth, 2 Str. 891; 2 Black. Com., p. 498.

⁵ Murray v. Barlee, 3 My. & K. 280.

⁶ Osgood v. Breed, 12 Mass. 525, 530; Plowd. 343; 11 Mod. 123; Swinburne, p. 88. *Contra*, Wood v. Bullock, 3 Hawks (N. C.), 298.

⁷ Brooke v. Brooke, 25 Beav. 342; In re Tharp, L. R. 3 P. D. 76.

⁸ Howard v. Digby, 8 Bligh (N. S.), 224, 259, 265; 1 Jarman on Wills, 40.

the testamentary power upon married women, it is required that the consent of the husband shall be had in order that his right of curtesy in the real property of the wife and his right to share in her personal property may be cut off.¹ The statutes usually require that the consent of the husband shall be in writing, as in Delaware, where it is required that the consent shall be in writing, signed and sealed by her husband in the presence of witnesses.² The signature of the husband to a petition for the probate of the will under consideration is not a written consent to the will within the meaning of a statute providing that he shall not be deprived of curtesy unless he shall give written consent to the will.³

§ 123. The testamentary incapacity of convicts.—In England, according to a rule of law which prevailed down to comparatively recent times, the real estate of a person attainted of

¹ *George v. Bussing*, 15 B. Mon. 558, 563; *Shute v. Sargent* (N. H., 1898), 36 Atl. R. 282; *Beals v. Storm*, 26 N. J. Eq. 372; *Michel v. Baker*, 12 Md. 158; *Stewart v. Middleton* (N. J., 1898), 17 Atl. R. 294, as to power to dispose of the husband's curtesy.

² *Myers v. Egner*, 6 Houst. (Del.) 342. In Kansas neither husband nor wife can make a will disposing of more than one-half of the property of the deceased to others. Constitution of Kansas, art. 15, § 9; Laws 1883, ch. 168, § 1; *Vining v. Willis*, 40 Kan. 609; *Allen v. Hannum*, 15 Kan. 625.

³ *Tyler v. Wheeler*, 35 N. E. R. 666, 160 Mass. 206; *Silsby v. Bullock*, 10 Allen, 94; *Burroughs v. Nutting*, 105 Mass. 228. Under a statute permitting a woman to execute a will with the consent of her husband, she may give all her property by the will to him. *Richards v. Clark*, 18 N. J. Eq. 327, 21 id. 361. Kentucky Gen. Stat., ch. 52, art. 2, sec. 6, provides that a court may, on the joint petition of husband and wife, empower a wife to dispose of her estate by will. A judgment of the court under this statute is of no effect to validate a will made before the judgment is

rendered, unless it shall be subsequently re-executed. *Gregory v. Oates*, 92 Ky. 532, 18 S. W. R. 231; *Garner v. Wills*, 92 Ky. 386. As to power of married woman under statute to dispose of her property, see *Allen v. Little*, 5 Ohio, 65; *Johnson v. Sharp*, 4 Cold. (Tenn.) 45; *Van Wert v. Benedict*, 1 Bradf. (N. Y.) 114; *Dickinson v. Same*, 61 Pa. St. 401; *Mosser v. Mosser*, 32 Ala. 551. Testatrix and her husband, being childless, had accumulated a considerable property, mostly from the husband's labor. Testatrix held notes payable to her alone, which she caused to be re-executed payable to her sole and separate use, and took an assignment of a bond and mortgage in like terms. Her husband knew nothing of these arrangements, nor of the will which she made assuming to dispose of the property to his exclusion. It was held that testatrix was merely custodian of the common funds, and could not make such a will under the statute empowering a married woman to dispose by will "of any estate secured to her separate use by deed or devise." *Wehle v. Umpfenbach* (Ky.), 23 S. W. R. 360.

treason being forfeited to the crown, such person could not devise it. So in the case of felony, the lands of the felon having, upon his sentence to death, by reason of the attainder which was a consequence of such sentence, escheated to the king or to some feudal superior of the felon, the former owner no longer possessed the capacity to devise them. The general rule that no interest which does not descend to the heir is devisable was applied. Where attainder did not attach to the sentence, *i. e.*, in every case where the punishment was not capital, the convict might devise his real estate.¹ In the reign of George III. a statute was passed² by which it was enacted that no attainder for felony, except in the case of treason or murder, or in aiding or abetting the same, shall bring about a disinherison of the heir nor prejudice the right or title of any person, except the right or title of the offender during his life; and providing, moreover, that it shall be lawful for any person claiming said right or title to enter on the lands as though no attainder had been had. This statute might, without very much license, be construed as conferring the right to devise upon those who were convicted and sentenced to be punished for ordinary felonies, leaving the condition of those attainted of treason and murder as it had been heretofore. Subsequently by statute 33 and 34 Vict., c. 23, attainder for felony was absolutely abolished.³ The act also provides that no action or suit for the recovery of property shall be prosecuted by a convict during his imprisonment, nor can he alienate or charge his property during his imprisonment. A person, called an administrator, is appointed, whose duty it shall be during the imprisonment of the convict to hold all his property, both real and personal, which he may own or to which he may acquire title, with power to sell, mortgage and manage the same, and to support the family of the convict out of the proceeds thereof. The administrator holds as a *quasi*-trustee for the convict, and he may accumulate any surplus income for the benefit of the

¹ *Rex v. Willes*, 3 Bar. & Adol. 510; *Rex v. Bridger*, 1 M. & W. 147; *In re Harrop's Estate*, 3 Drew. 726.

² 54 Geo. III., c. 145.

³ The first section of the statute reads as follows: "No confession, ver-

dict, inquest, conviction or judgment of, or for any treason, felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat."

convict and his heirs; and, when the convict's term of imprisonment is at an end, the title to the property is to revest in him at once. A very important provision of this statute is, that the power of the administrator is to cease *eo instante* at the *death of the convict*. From this last-mentioned provision it follows that the convict has the full power to dispose of both real and personal property by will, as his will does not take effect until his death, at which date the legal title in the administrator terminates and the title vests in the heirs of the convict unless he shall dispose of the same by his will. In some states statutes have been passed prohibiting convicts from making wills or executing other conveyances during their imprisonment. Such statutes are designed for the protection of the convict by removing all opportunity for the practice of fraud or coercion upon him while he is in prison. They deprive him of no property rights, and he may take by devise or grant and prosecute his legal rights in a court of law in the same manner and to the same extent as though he were a free man.¹

§ 124. **The testamentary capacity of paralytics.**—The will of a person who was afflicted with paralysis to such an extent that he was totally destroyed of the power of speech has been sustained. But he was shown to have retained his mental powers to a sufficient degree to take an interest in and to have a thorough knowledge of all his business affairs. He communicated his wishes by signs, in reply to questions put to him; and, after the will was written out, it was read to him by paragraphs and he nodded assent to all its provisions.² But the circumstances that the testator was speechless or nearly so from a paralytic shock or apoplectic seizure, and that he was bedridden at the time, call for caution in receiving the will. The evidence that the testator understood what he was doing, and that his gestures were correctly translated to the draughtsman, must be satisfactory to the court.³ If it appears that the will was largely the result of prompting and suggestive questions, and that he had but little comprehension of the nature

¹ *Kenyon v. Saunders*, 18 R. I. 590, 551, 30 Pac. R. 453; *In re Miller*, 179 30 Atl. R. 470 (Pub. St., c. 248, secs. Pa. St. 645, 36 Atl. R. 139. 34, 52).

² *In re Raynor's Will*, 63 Hun, 635,

³ *Rothrock v. Rothrock*, 22 Oreg. 18 N. Y. Supp. 426.

of the transaction in which he was engaged, probate ought to be refused.¹

These considerations are applicable in all physical ailments which involve mental derangement, and which, by depriving the testator of his powers of communicating his wishes to others, render him liable to fraud or imposition. Apoplectic attacks, producing paralysis, distorting the mouth and features and affecting the speech, indicate that a certain part of the brain is diseased. Necessarily the memory and intelligence of a person thus afflicted must be impaired, and the effect of repeated attacks of apoplexy would undoubtedly be to weaken the mental faculties more and more, particularly in the case of persons of advanced age. And it is safe to say that continuous and repeated attacks of apoplexy in conjunction with coma and loss of intelligence may indicate *senile dementia*, absolutely destroying testamentary capacity.²

¹ *Mendendall v. Tungate*, 95 Ky. 206, 24 S. W. R. 481. In a recent Illinois case it was determined that a will had been procured by undue influence under the following circumstances: The testator was seventy-three years of age, and at the time of execution was stricken with aphasia, and absolutely unable to write or speak, except to mumble "yes" and "no." He was surrounded by those who benefited by his will, one of whom was a woman with whom he had maintained illicit relations for many years, and it was proved that in his last sickness this

woman induced a friend of the testator to persuade him to make a will in her favor. It also appeared that the will was made in the presence of the beneficiaries and a doctor, being drawn by a justice, who asked questions, to all of which the testator simply responded by nodding his head. His relatives were not present and knew nothing of the will. He was utterly unable to say a word which any one could understand. *Smith v. Henline*, 51 N. E. R. 227, 174 Ill. 184.

² *Hudson v. Hughes*, 56 Kan. 152, 159.

CHAPTER VII.

THE NATURE AND EFFECT OF FRAUD AND UNDUE INFLUENCE PRACTICED ON THE TESTATOR.

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| <p>§ 125. The degree of influence which will be regarded as undue.</p> <p>126. Character of the facts to be proved — The inquiry into the mental condition of the testator.</p> <p>127. An allegation of undue influence implies testamentary capacity.</p> <p>128. The burden of proving undue influence.</p> <p>129. The existence of undue influence at the time of execution.</p> <p>130. The existence of an opportunity for undue influence creates no presumption against the will.</p> <p>131. Secrecy attendant upon the execution of the will.</p> <p>132. The inference of fraud or undue influence from circumstances — The range of the evidence to show undue influence.</p> <p>133. The presumption against undue influence from non-revocation.</p> <p>134. Alteration of an existing will as indicating undue influence.</p> <p>135. An unreasonable and unnatural will as evidence of undue influence.</p> <p>136. Evidence to explain the apparently unjust character of the will.</p> <p>137. The will drawn by or under the direction of a beneficiary or the executor.</p> | <p>§ 138. The relevancy of the physical weakness or illness of the testator to show incapacity and undue influence.</p> <p>139. The physical condition of the testator at the date of execution.</p> <p>140. Habitual drunkenness as bearing upon undue influence.</p> <p>141. The knowledge of the contents of the will and its reading by or to the testator.</p> <p>142. Wills of foreigners written in the English language.</p> <p>143. The influence of kindness and affection.</p> <p>144. The influence of flattery, persuasion and importunity.</p> <p>145. The effect of confidential relations existing between the testator and a beneficiary.</p> <p>146. Undue influence of a priest or other religious advisor.</p> <p>147. The influence of a wife is not undue.</p> <p>148. Evidence of the ante-nuptial relations of the parties.</p> <p>149. Adulterous relations existing between the testator and a beneficiary as bearing upon undue influence.</p> <p>150. No presumption of undue influence in devise to mistress of the testator.</p> <p>151. Wills procured by fraud — Fraud defined and classified.</p> <p>152. Evidence of false and misleading statements by the beneficiary.</p> |
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§ 153. Trusts arising *ex maleficio*.

154. Actions on the part of the beneficiary which constitute him a trustee *ex maleficio*.

155. Acts and statements of one of several as binding on the others in a secret trust.

156. The admissibility of parol evidence to prove the fraud.

157. The resulting trust for the heirs where an implied secret trust is void.

158. No trust arises where the promise is without consideration.

159. The will may be admitted to probate as to that part not procured by undue influence.

§ 160. Equitable jurisdiction in case of the homicide of the testator by a beneficiary.

161. The declarations of the testator to show or to rebut undue influence or fraud.

162. The declarations of intention to explain inequality of distribution.

163. The declarations of the legatees or of an executor to show undue influence or fraud.

164. Wills executed by a mistake.

165. The forgery of the will — The burden of proof — The doctrine of reasonable doubt not applicable — Range of the evidence.

166. Evidence of other forgeries — Expert evidence.

§ 125. The degree of influence which will be regarded as undue.— The mental and physical capacity of the deceased is to be considered in determining what degree of influence will vitiate his will. Influence which would be undue in the case of one individual because it is wholly subversive of his will, would produce no effect at all upon the mind of another. The will of one whose independence has been weakened by indulgence in dissipation,¹ or whose stamina, physical or mental, has been broken by illness or old age,² may be easily overcome. But the same amount of pressure exerted upon the mind of a man of an independent and firm spirit, good understanding and capable of managing his own affairs would produce little, if any, effect. No precise principle can be enunciated, no distinct rule can be laid down, which will be applicable to all cases. Every case depends wholly upon its own particular facts and attendant circumstances.

The general rule is that the degree of influence necessary to be exerted over the mind of the testator in order to be regarded as undue, and to render a will which is procured thereby invalid, must be such as has induced the testator to act contrary to his own wishes. He must have been impelled by the press-

¹ *Ante*, § 108.

² *Ante*, § 117.

ure of the undue influence to make a different will from what he would have made if he had been left entirely alone and free to act according to his own judgment and discretion. His free agency and liberty to act and his independent volition must have been overcome by the influence exerted upon him.

His mind must have been hindered and restrained in its actions. And it is not material whether his volition was overcome by threats or fear, or by falsehoods, importunities or annoyances. If the influence was sufficient to constrain him to do what was against his will, so that his testament speaks the mind of another and not his own, it is undue, and the will is void. His free agency must have been destroyed by the influence brought to bear upon him; and it is not material how this was done, so long as he was unable to resist either through weakness or fear, or the desire for peace and quiet.¹

¹ *Johnson v. Armstrong*, 97 Ala. 781, 12 S. R. 72; *Gilbert v. Gilbert*, 22 Ala. 529, 532; *Taylor v. Kelly*, 81 Ala. 59, 70; *Coghill v. Kennedy* (Ala., 1893), 24 S. R. 459; *Rogers v. Diamond*, 13 Ark. 474; *McDaniel v. Crosby*, 19 Ark. 533; *Knox v. Knox*, 95 Ala. 495, 11 S. R. 123; *Comstock v. Hadlyme*, 8 Conn. (1830), 254; *Dale's Appeal*, 57 Conn. 127, 17 Atl. R. 757; *Chandler v. Ferris*, 1 Harr. (Del., 1834), 454, 464; *Potts v. House*, 6 Ga. 324, 359; *Allmon v. Pigg*, 82 Ill. (1876), 194; *Meeker v. Meeker*, 75 Ill. 260; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. R. 645; *McIntire v. McCoon*, 28 Iowa (1869), 480, 486; *Webber v. Sullivan*, 58 Iowa, 260, 263; *Mooney v. Olson*, 22 Kan. (1879), 69, 78; *Denton v. Franklin*, 9 B. Mon. (48 Ky.) 28; *Barnes v. Barnes*, 66 Me. 286, 297; *Potter's Appeal*, 53 Me. 106; *Davis v. Calvert*, 5 Gill & J. (Md.) 270, 302; *Shailer v. Bumstead*, 99 Mass. 112, 119, 121; *White v. Bailey*, 10 Mich. 155, 159; *Norton v. Paxton*, 110 Mo. 456, 467; *Carl v. Gabel*, 120 Mo. 283, 297, 25 S. W. R. 214; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. R. 506; *Thompson v. Ish*, 99 Mo. 160 (1889), 12 S. W. R. 510; *Myers v. Hauger*, 98 Mo. 433, 11 S. W. R. 97; *Baldwin v. Parker*, 99 Mass. 79, 85; *Maynard v. Vinton*, 59 Mich. 139; *Lynch v. Clements*, 24 N. J. Eq. 431; *Hampton v. Westcott*, 49 N. J. Eq. 523, 530; *Rollwagen v. Rollwagen*, 63 N. Y. 504 (1875); *In re Van Houten's Will*, 41 N. Y. Supp. 250, 17 Misc. R. 445; *Ledwith v. Claffy*, 45 N. Y. Supp. 612; *In re Armor's Will*, 154 Pa. St. 517, 32 W. N. C. 269, 26 Atl. R. 619; *Hoge's Estate*, 2 Brewst. (Pa.) 450, 454; *Thompson v. Kyner* (1870), 65 Pa. St. 368; *Marshall v. Flinn*, 4 Jones (N. C.), L. 199; *O'Neill v. Farr*, 1 Rich. (S. C.) 80; *Chappell v. Trent*, 90 Va. 849, 19 S. E. R. 314; *Walters v. Walters*, 89 Va. 849, 17 S. E. R. 515; *Jackman's Will*, 26 Wis. (1870), 104, 112-115; *In re Farnsworth* (1885), 62 Wis. 474, 479; *Farney v. Ferrell*, 4 W. Va. (1871), 729. "In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the

§ 126. Character of the facts to be proved — The inquiry into mental condition of the testator.— The question whether the will was procured by undue influence is, in the last analysis, a question of fact to be determined by the jury. It must be

companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged or even importuned the young man so to dispose of his property; provided only, that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud. I must further remark that all the difficulties of defining the point at which influence exerted over the mind of the testator becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish. In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is

not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife by falsehood raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may perhaps be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say that, allowing a fair latitude of construction, they must range themselves under one or other of these heads—*coercion* or *fraud*. One point, however, is beyond dispute, and that is that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot

shown to their satisfaction on all the facts in evidence, that *first*, fraud or undue influence was practiced; *second*, that either, or both in conjunction, resulted in producing the will. Hence, the question of undue influence may be viewed from the double aspect suggested by these two classes of facts which are to be proved.

In the first class, and tending to show an actual exercise of coercion, are all the acts and utterances which have been employed to procure the will and to overcome the mind of the testator. The jury has a right to go into the full and minute details of the actions and language of the person who is charged with undue influence, and to hear everything that has a bearing upon any fraud by which the testator has been misled, or upon the coercion by which his mind has been overcome. If the inquiry stops here it will be incomplete; for, however pressing or urgent may have been the force employed, or however confusing and misleading the fraud, still it must be ascertained whether in this particular case *the mind of the testator has been influenced*. It therefore becomes necessary to inquire into his state of mind, to ascertain whether his mind was clear and strong or not; for, as we have pointed out, acts and utterances which would coerce one man will have no effect upon another.¹

It matters not how mischievous the fraud, or how stringent the coercion, provided it has not overcome the will of the testator. If he possessed intelligence enough to detect and the strength to restrict the fraud or intimidation (and that he did can only be obtained by an inquiry into his mental state), no allegation of undue influence can be sustained.² It is for this reason that a careful and minute inquiry is not only permitted but encouraged, not only into the mental condition of the testator, but into his physical condition; whether he is well or ill, strong or feeble, at the time of the execution of the will. So far as his mental condition is concerned, the inquiry is to be directed *to the moment of the execution of the will*. But as a man's mental condition at any moment of his life is almost always the result of past impressions on his mind, past expe-

be presumed." Remarks of Lord Atl. R. 117; Caven v. Agnew, 40 Atl. Cranworth in Boyse v. Rossborough. R. 480, 42 W. N. C. 217; McHugh v. 6 H. L. Cases, 2, on p. 47. Fitzgerald (Mich., 1898), 61 N. W. R. 354, 355; Manley's Ex'rs v. Staples, 65

¹ § 125, *ante*.

² Moore v. McDonald, 68 Md. 321, 12 Vt. 370, 26 Atl. R. 630.

riences or past mental derangement, it is proper to extend the range of inquiry into the mental condition over a period somewhat lengthy.¹

Nor need the inquiry into the mental conditions of the testator be restricted to those conditions which are the result of violent derangement or extreme mental perturbation. His mental attitude to the proponent and to the contestant, to his family and relations, and to those who are strangers, and his mental habit of treating those with whom he comes in contact, are proper for consideration. If he is in any wise peculiar or eccentric in his conduct, thought or speech, it may be noted; but it cannot be said that undue influence presupposes weakness or imbecility of mind, though it is undoubtedly true that, *ceteris paribus*, a man of weak mind will succumb most readily to fraud or coercion. But so far as the issue of undue influence is concerned, it must be decided by the jury as a conclusion upon all the evidence, keeping in view the proof of the acts and declarations alleged to constitute the undue influence, the mental condition of the testator, and the character of the will itself as learned by a careful comparison and inspection of all its provisions.

§ 127. **An allegation of undue influence implies testamentary capacity.**— So far from a charge that the execution of a will was procured by undue influence, implying testamentary incapacity in the testator, it may properly be said that it *conclusively implies* that he possessed testamentary capacity to execute a valid will. Commonly allegations of undue influence and of lack of testamentary capacity are commingled in the same pleading; and frequently the evidence which tends to prove one tends to prove the other. Thus, proof that the testator was at the moment of execution suffering from extreme physical and mental weakness is equally relevant to prove that he was lacking in testamentary capacity, and that, because of his weakness,² he was particularly susceptible to the menaces and arts of the person seeking to unduly influence him. But where the issue is undue influence *alone*, the capacity of the testator will be conclusively presumed; and any evidence which is relevant solely to show incapacity is inadmissible.³

¹ *Ante*, § 103.

² *Ante*, § 114.

³ *Gwin v. Gwin* (Idaho, 1898), 48 Pac. R. 295; *Stirling v. Stirling*, 64

§ 128. **The burden of proving undue influence.**—The execution of the will of a testator, who is *admitted to have possessed testamentary capacity*, like every human act, is presumed to be wholly free and voluntary until the contrary is proved, or until some facts and circumstances are shown from which the law may imply the existence of undue influence. Hence, when, in a proceeding to admit a will to probate, it is alleged that the will was procured by undue influence or fraud, the burden of proving the existence of the undue influence at the time of execution, and that the will was the result and outcome of it, is upon the contestant.¹

§ 129. **The existence of undue influence at the time of execution.**—The undue influence must have been in operation upon the mind of the deceased *at the time of the execution of the will*. The inquiry is therefore usually directed to the state of the volition and the condition of the mind of the testator at that date, and evidence of his being under the influence of the party

Md. 138, 21 Atl. R. 273; In re Taylor's Estate, 92 Cal. 564, 28 Pac. R. 603.

¹ Bulger v. Ross, 98 Ala. 267, 12 S. R. 803; Chandler v. Jost, 96 Ala. 596, 604; Leeper v. Taylor, 49 Ala. 221; Taylor v. Kelly, 31 Ala. 59 (1858); McDaniel v. Crosby, 19 Ark. 533; Potts v. House, 6 Ga. 324, 362; Dale's Appeal, 57 Conn. 127, 17 Atl. R. 757; Morris v. Stokes, 21 Ga. (1857), 552; Sutton v. Sutton, 5 Harr. (Del., 1850), 459; Roe v. Taylor, 45 Ill. 485; Rutherford v. Morris, 77 Ill. 397; Moyer v. Swygart, 125 Ill. 262 (1888), 17 N. E. R. 450; Webber v. Sullivan, 58 Iowa (1882), 260, 263, 12 N. W. R. 369; In re Allison (Iowa, 1897), 73 N. W. R. 489; Malcomsen v. Graham, 75 Iowa, 54, 58, 39 N. W. R. 179; Rich v. Bowker, 25 Kan. 7; Johnson v. Stevens, 95 Ky. 128, 23 S. W. R. 957; Barlow v. Waters (Ky.), 28 S. W. R. 785, 786; Fee v. Taylor, 88 Ky. 259; Small v. Small, 4 Me. 220; Barnes v. Barnes, 66 Me. 286; Wampler v. Wampler, 9 Md. 540; Higgins v. Carlton, 28 Md. 115; Baldwin v. Parker, 99 Mass. 79, 85; Glover v. Hayden, 4 Cush. (Mass.) 580; Keone v. Barnes, 108 Mass. 344, 346 (1871); Davis

v. Davis, 123 Mass. (1878), 590, 597; Potter's Appeal, 53 Mich. 106; Carl v. Gabel, 120 Mo. 283, 295; Harvey v. Sullens, 46 Mo. 147; Taylor v. Wilburn, 20 Mo. 306; Jones v. Roberts, 37 Mo. App. 163; Maddox v. Maddox, 114 Mo. 35, 21 S. W. R. 499; Gordon v. Burris (Mo., 1897), 43 S. W. R. 642; Sullivan v. Foley (Mich., 1897), 70 N. W. R. 332; Bush v. Delano (Mich., 1897), 71 N. W. R. 628; Seebrock v. Fedawa, 30 Neb. 424, 46 N. W. R. 650; Brick v. Brick, 66 N. Y. 144 (1876); Gardner v. Gardner, 22 Wend. (N. Y., 1839), 526; Wightman v. Stoddard, 3 Bradf. (N. Y.) 393; In re Coleman, 111 N. Y. 120, 19 N. E. R. 71; Tyler v. Gardner, 35 N. Y. 559 (1866; In re Bedlow's Will, 22 N. Y. Supp. 290, 67 Hun. 408; In re McGraw's Will, 41 N. Y. Supp. 481; Carroll v. House, 48 N. J. Eq. 269, 23 Atl. R. 191; Waddington v. Buzby, 43 N. J. Eq. 354, 10 Atl. R. 862; Eckert v. Floury, 43 Pa. St. 46; Kennedy v. Upshur, 66 Tex. 442, 1 S. W. R. 308; Davis v. Dean, 66 Wis. 108, 110; In re Slinger, 72 Wis. 27, 33; Coffman v. Herrick, 32 W. Va. 119, 9 S. E. R. 65; McMaster v. Scriven, 85 Wis. 162, 171.

charged with the undue influence *at other times is only relevant so far* as it illustrates undue influence at that time. If it is shown to the satisfaction of the court that his mind was free from extraneous control, so that the execution of his will was the deliberate outcome of his own volition, it should be upheld.¹

But the evidence need not be confined to the precise point of time covering the execution of the will. All that is peculiar in the previous life of the deceased, his idiosyncracies and modes of thought so far as they cast any light upon his situation when he made his will, are to receive consideration. The previous mental condition of the testator, whether vigorous or the reverse, is relevant, not to show testamentary capacity or a lack of it, but as evidence from which it may be inferred that he was open to importunity or coercion at the date the will was made.² But it is immaterial that on other occasions attempts had been made by coercion or excessive importunity to procure a similar testamentary disposition, if the influence has ceased prior to the date of the execution of the will which is in question.³

§ 130. The existence of an opportunity for undue influence creates no presumption against the will.—The fact that the proponent of a will had an opportunity, at the date of its execution, to exert undue influence, raises no presumption that he did so. There must be some direct evidence which will prove that the beneficiary *did something to procure the will*.

¹ *Chandler v. Ferris*, 1 Harr. (Del., 1834), 454; *Pooler v. Christman*, 145 Ill. 405; *Rabb v. Graham*, 43 Ind. (1873), 1; *Sechrest v. Edwards*, 4 Met. (61 Ky.) 163, 174; *Morris v. Marton* (Ky.), 20 S. W. R. 287; *Higgins v. Carlton*, 28 Md. 115; *Haines v. Hayden*, 95 Mich. 332, 54 N. W. R. 911; *Gardiner v. Gardiner*, 34 N. Y. 155; *Thompson v. Kyner*, 65 Pa. St. 368; *McMahon v. Ryan*, 20 Pa. St. (1853), 329; *Steadman v. Steadman* (Pa., 1888), 14 Atl. R. 406; *Eckert v. Flowry*, 43 Pa. St. 46; *Reichenbach v. Ruddach*, 127 Pa. St. 564, 24 W. N. C. 476, 18 Atl. R. 432; *Monroe v. Barclay*, 17 Ohio St. (1866), 303; *Trezevant v. Rains*, 85 Tex. 329, 25 S. W. R. 1092; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. R. 598; *In re Spratts*, 4 App. Div. (N. Y.) 1; *McMahon v. Ryan*, 20 Pa. St. 329.

² *Ante*, § 126.

³ "To invalidate a will on the ground of *fraud* and *undue influence* it must be shown that they were practiced with respect to the will itself, or so contemporaneously with the will or connected with it as by almost presumption to affect it. Other frauds committed against a testator are only evidence to raise a strong suspicion against any act done under the superintendence or by the interference of those committing them." By Lushington, J., for the court, in *Jones v. Godrich*, 5 Moo. P. C. 16, on p. 40.

The evidence must connect him and his acts, however remotely, with the execution. But evidence which shows that he was more or less actively engaged in procuring the will, though it also tends to show that he possessed an opportunity to exert undue influence, is not thereby inadmissible. Indeed some authorities hold that it is proper to introduce evidence which *merely shows opportunity and inclination*, without *proving any act* on the part of the proponent.

However this may be, it is undoubted that the relations of the testator and the beneficiary, the surroundings of both, and the conditions of friendship and affection, or the reverse, existing between them, are always relevant. If they, as frequently happens, dwelled together in the same house, or were members of one family, it is proper to prove that they were on friendly terms, or the contrary; that they were kind or unkind to one another; that the testator had a greater affection for some of them than for others; and similar facts of family history. And if the testator and the beneficiary are not related, it is proper to show that they were often together; that they were intimately associated in social or business affairs; and that they lived near and frequently visited one another.¹

¹ *Capper v. Capper*, 52 N. E. R. 98; *Harp v. Parr*, 168 Ill. 459, 472, 48 N. E. R. 113; *McKeone's Will*, 108 Mass. (1871), 344, 346; *Severance v. Severance*, 90 Mich. 417; *Aylward v. Briggs* (Mo., 1898), 47 N. W. R. 510; *In re Hess' Will*, 48 Minn. 504, 51 N. W. R. 614; *Latham v. Schaar*, 41 N. W. R. 354 (1889), 25 Neb. 535; *Clifton v. Clifton*, 47 N. J. Eq. 227, 21 Atl. R. 333; *In re Palmateer's Will*, 78 Hun, 43 (1894), 28 N. Y. Supp. 1062; *In re Clark*, 25 N. Y. Supp. 712, 5 Misc. R. 68; *In re Phalen's Will*, 64 Hun, 639; 19 N. Y. S. 358; *In re Dunham's Will*, 48 Hun, 618, 1 N. Y. Supp. 120; *Cudney v. Cudney*, 68 N. Y. (1877), 148, 152; *Brick v. Brick*, 66 N. Y. 149; *In re Smith*, 95 N. Y. 516, 523; *In re Martin*, 98 N. Y. (1884), 193, 196; *In re Fricke's Will*, 19 N. Y. S. 315, 317; *Frost v. Dingles*, 118 Pa. St. 259, 12 Atl. R. 296; *In re Tallman's Will*, 148 Pa. St. 286, 23 Atl. R. 986; *Trezevant v. Rains*, 85 Tex. 329, 19 S. W. R. 567; *In re Pitt*, 85 Wis. 162, 55 N. W. R. 149. Where the testator, who had been separated from his wife for many years, lived with his son, and his daughter had not visited him for several years, it was held that the facts that the son summoned the attorney to prepare the will, and the witnesses who were present at its execution, do not indicate undue influence on his part. The evidence of the family situation, and the relations between the testator, his wife and daughter, sufficiently explained the circumstances. *Fritz v. Turner*, 29 Atl. R. 125 (1890), 46 N. J. Eq. 515. Proof that the partner of the testator, who is alleged to have procured the will by undue influence, exerted great influence over the testator, visited him during his last illness,

§ 131. Secrecy attendant upon the execution of the will. That the beneficiary under the will, who is in confidential relations to the testator, surrounds him with barriers designed to prevent his relatives and friends from having access to him or communicating with him, is always a strong circumstance pointing to the inclination as well as to an opportunity to exert undue influence. Particularly is this the case if the testator is an aged person or an invalid, and is cared for by the proponent at his residence.

The fact that the testator does *not* divulge that he has executed a will to those who are either benefited by it or who are deprived of what they would take if he had died intestate, is generally a circumstance of no importance to show undue influence. But the fact that the testator, *being under the control of the beneficiary*, is *by him* prevented from informing his relatives that he has made a will, or the fact that the knowledge of the making of the will is, *by the beneficiary*, prevented from reaching the heirs of the testator, is a circumstance of great weight in showing that undue influence was used to procure the will.

§ 132. The inference of fraud or undue influence from circumstances — The range of the evidence to show undue influence.— The undue influence, if any, which was instrumental in procuring the will may have been, and usually is, exercised secretly and in a clandestine manner. Such is always the case where confidential relations are shown to have existed between the testator and the person accused of exerting the fraud or coercion, and particularly so where they resided together in the same house.¹ Under such circumstances, where the actions of both parties are securely screened from public gaze, and the beneficiary has an abundant opportunity to practice his artifices and to strengthen his domination over the mind of the testator free from danger of interruption, or from the observation of third parties, it is difficult, if not impossible,

held constant communication with him, and circulated the report that the relatives of the testator had treated him badly, is not enough to show that a will, leaving the estate

to the partner's children, was procured by undue influence. *Carpenter v. Bailey*, 29 Pac. R. 1101, 94 Cal. 406.

¹ *Ante*, § 130.

to prove an allegation of undue influence by evidence which is wholly direct and positive.¹ Whether the evidence be direct or circumstantial it must be of a reasonably satisfactory and convincing character. And the result of the secret exercise of undue influence or fraud under the circumstances above described may be plainly visible, though there be a total absence of direct evidence that undue influence existed. But as the visible results of the undue and improper coercion or fraud *may be also perfectly consistent with a will voluntarily executed* by the testator, the jury must, where the evidence is wholly circumstantial, exercise great caution and deliberation in considering every aspect of the case.²

Direct proof of fraud or undue influence is always desirable, but not indispensable. Either, or both where they are commingled, may be inferred from circumstances, though the circumstances must necessarily and logically lead to the inference that fraud or coercion was employed, and that the will does not represent the real intentions of the testator.³

In all cases where the procurement of a will by undue influence or fraud is alleged, the evidence, whether direct or circumstantial, should be permitted to take a very wide range. The nature of the relations and dealings between the testator

¹ *Ante*, § 131.

² See *Foster v. Dickinson*, 64 Vt. 233, 24 Atl. R. 253; *Hartman v. Strickler*, 82 Va. 225.

³ *Chandler v. Jost*, 96 Ala. 596, 602, 11 S. R. 636; *Purdy v. Hall*, 134 Ill. 296, 25 N. E. R. 645; *Moomey v. Glenn*, 22 Kan. (1879), 69, 76; *Fry v. Jones*, 95 Ky. 148, 24 S. W. R. 5; *Davis v. Calvert*, 5 Gill & J. (Md., 1833), 269, 285, 305; *Carl v. Gabel*, 120 Mo. 283, 297, 25 S. W. R. 214; *Haines v. Hayden*, 95 Mich. 332, 54 N. W. R. 911; *Ledwith v. Claffey*, 45 N. Y. S. 612; *In re Blair's Will*, 16 N. Y. S. 874; *Reynolds v. Root*, 62 Barb. (N. Y., 1872), 250; *In re Armor's Estate*, 154 Pa. St. 517, 522, 26 Atl. R. 619, 32 W. N. C. 269; *In re Titlow*, 54 Pa. St. (1867), 216; *Wison v. Mitchell*, 101 Pa. St. 495; *Whitelaw's Ex'rs v. Sims*, 90

Va. 588, 590, 19 S. E. R. 113; *Spehn v. Huebschen*, 83 Wis. (1893), 313, 315, 53 N. W. R. 550; *Jackman's Will*, 26 Wis. (1870), 104. It is error for the court to refuse to instruct the jury that in determining the question of fraud and undue influence they may take into consideration the condition of the mind of the testator at the time of execution, the condition and the relative situation of the testator and the proponent, the situation, condition and surroundings of the testator himself, the nature and the extent of the property of the testator, all the circumstances under which the will was made, together with the provisions of the will itself. *Reichenbach v. Ruddach*, 127 Pa. St. 546, 24 W. N. C. 476, 18 Atl. R. 432. See also §§ 126-130.

and the beneficiaries,¹ the extent of the property of the testator, his social and commercial standing, his family connections, the claims of particular persons upon his bounty, the situation of the beneficiaries, social and pecuniary, the situation and the mental condition of the testator,² the nature and the contents of the will itself, and all the circumstances under which it was executed, may be considered as facts from which fraud and undue influence may be inferred, or by which they may be disproved.³

§ 133. **The presumption against undue influence from non-revocation.**—The circumstance that the testator, during a long period after the execution of his will, has refrained from revoking it, may, but does not of necessity, indicate that it was *not the product of undue influence*. If a condition of things is proved which, alone, indicates that the will was procured by undue influence, the inference of undue influence may be wholly overcome if it is shown that, when the condition from which the presumption of undue influence *might* have arisen no longer existed, and while the testator was free from any suggestion of such influence, he refrained from revoking the will that he had made. It is elsewhere explained to what extent the utterances of the testator, expressing satisfaction with his will, may be shown to confirm it.⁴ And the fact of the continued existence of the will unrevoked, in the *total absence of declarations*, is, where the testator has had the opportunity to revoke, a circumstance of *some value* in throwing light upon the voluntary character of his will. If, however, he has been prevented from revoking his will, either because it was not under his control, or by the active efforts of interested persons, the non-revocation of the will is of *no value as evidence*. So if, immediately after the execution of the will, the testator, through physical

¹ *Carpenter v. Hatch*, 64 N. H. 573 (1888), 15 Atl. R. 219; *In re Allison* (Iowa, 1897), 73 N. W. R. 489.

² *Denny v. Pinney's Heirs*, 60 Vt. 524 (1888), 12 Atl. R. 108.

³ *Barbour v. Moore* (D. C., 1897), 10 App. D. C. 30; *Mooney v. Olsen*, 22 Kan. 69; *Chandler v. Jost*, 96 Ala. 590, 604, 11 S. R. 636; *Potter's Appeal*, 53 Mich. (1884), 106; *Porter v. Throop*, 47 Mich. 313; *Beaubien v. Cicotte*, 12

Mich. (1864), 459; *Haines v. Hayden*, 95 Mich. 332, 347; *Beattie v. Thomson*, 16 R. I. 13, 11 Atl. R. 172; *Maxwell v. Hill*, 89 Tenn. (1890), 584; *Kennedy v. Upshaw*, 1 S. W. R. 308, 66 Tex. 442; *Spehn v. Huebschen*, 83 Wis. 313, 53 N. W. R. 550; *Harrison v. Rowan*, 3 Wash. C. C. 580. See also *post*, § 136 et seq.

⁴ See §§ 161, 162.

or mental incapacity, lost the testamentary power, the circumstance that the will continued to remain unrevoked is not to be considered.

§ 134. **Alteration of an existing will as indicating undue influence.**—The testator may at any time revoke his will; and the fact that he does so arbitrarily and without giving his reason for so doing raises no presumption that a new will, executed to revoke the former or to take the place of it, was unduly procured. The force of proof of a change of testamentary disposition depends wholly upon the circumstances of the particular case. If the earlier will was a natural one, according to the circumstances surrounding its execution, the execution of a later instrument of a character directly contrary is material. And if the testator, at the time of the execution of the later will, which is *not only unnatural, but directly contrary to his previous fixed and declared intention*, is in feeble health, and is surrounded by those who are favored by the later will, a suspicion of undue influence, to say the least, is created.¹ It would certainly be proper for the court, under such circumstances, to scrutinize all the evidence very closely to ascertain if the later will is the result of coercion or fraud, or if it was freely and voluntarily executed. But it cannot be said that there is any presumption against the later will.² And where the testator, a feeble, illiterate, intemperate and credulous man over eighty years of age, made a will giving the bulk of his property to a friend with whom he was temporarily staying, thereby revoking former wills disposing of property to his son and his grandson, it was held that the burden of proof was on the proponent to show freedom from undue influence.³ The circumstance that, prior to the execution of the will which is alleged to have been procured by undue influence, the testator had made other wills when, it is conceded, he was free from influence, disposing of his property to the same persons and in the same proportions mentioned in the will in question, is relevant to show the absence of undue influence.⁴

¹ *Post*, § 135 et seq.

394; *In re Monroe's Will*, 20 N. Y. Supp. 82, 2 Con. Sur. 395.

² *Barlow v. Waters* (Ky., 1897), 28 S. W. R. 785; *Stockton v. Thorn* (Minn., 1888), 39 N. W. R. 143; *McLaughlin v. McDevitt*, 63 N. Y. 387,

³ *In re Liney's Will*, 60 Hun, 582, 13 N. Y. Supp. 551.

⁴ *In re White's Will*, 121 N. Y. 406,

A sudden and complete change of testamentary disposition calls for some explanation. The proponent may introduce any evidence tending to show that the sudden alteration in the testamentary intention of the testator was justified under the circumstances of the case, as, for example, that he had quarreled with the legatees. The proponent ought to be permitted to prove the oral utterances of the testator which are contemporaneous with execution, showing his reasons for revoking or altering the disposition of his property as contained in a former will.¹

A change of intention in favor of the heirs or next of kin of the testator, however sudden, does not create even a suspicion of undue influence, and should not be considered by the jury unless there is other evidence clearly pointing to undue influence, for the natural disposition of a man to favor his own kindred is enough to account for the change.²

§ 135. An unreasonable and unnatural will as evidence of undue influence.—The mere fact that the testator disposes of his property unequally, or in a manner which may seem unreasonable, raises no presumption of undue influence. A testator having capacity, and acting freely and without coercion, may dispose of his property as he sees proper. He may disinherit his heir.³ And if it shall appear that, upon all the circumstances of the case, he was not acting under compulsion, the fact that the court or the jury may consider his will unjust or inequitable should not *alone* be permitted to vitiate it. The unnatural or the absurd character of a will does not cast the burden of proof upon the proponent to show that its execution was free from undue influence.⁴

24 N. E. R. 935; In re Bartholick's Will, 5 N. Y. Supp. 842; Beaubien v. Cicotta, 12 Mich. 459; Hughes v. Hughes, 81 Ala. (1859), 519; Love v. Johnson, 12 Ired. (84 N. C.) L. 355; Dodge v. Meech, 1 Hagg. 612; Marsh v. Tyrrell, 2 Hagg. 84; 1 Jarman, 81.

¹ In re Dates' Estate, 58 Hun, 608, 12 N. Y. Supp. 205; In re Glockner, 2 N. Y. Supp. 97; *post*, § 162.

² In re Green, 20 N. Y. Supp. 538; In re Barnes, 22 N. Y. Supp. 1112, 67 Hun, 527.

³ Henry v. Hall, 106 Ala. 84, 17 S. R. 187.

⁴ Chandler v. Jost, 96 Ala. 596, 11 S. R. 636; Fountain v. Brown, 88 Ala. 72; Burney v. Torrey, 100 Ala. 157, 14 S. R. 685; Crandall's Appeal, 68 Conn. 365, 28 Atl. R. 531; In re McLane's Estate, 21 D. C. 554; Pergason v. Etcherson, 91 Ga. 735, 18 S. E. R. 29; Allmon v. Pigg, 82 Ill. (1876), 194; Bennett v. Hibbert, 88 Iowa, 154, 55 N. W. R. 93; Webber v. Sullivan, 58 Iowa (1882), 260, 263, 12 N. W. R. 319;

The fact that a testator leaves all his property to a stranger, to the exclusion of the members of his family, does not raise any legal presumption of undue influence.¹ So, too, the fact that the testator had indigent relations for whom he made no provision in the will, which gives all his property to his spiritual adviser, is no indication alone of undue influence having been exerted by the latter,² particularly where it appears that the testator was not on good terms with his relatives.

But the apparently unnatural and unjust character of the will, the facts that the testator seemingly overlooks the claims

McIntire v. McConn, 28 Iowa, 480, 486; Herbert v. Long, 23 S. W. R. 658; Zimlich v. Zimlich, 90 Ky. 657, 660; Barrow v. Waters (Ky.), 28 S. W. R. 785; Sullivan v. Foley (Mich., 1897), 70 N. W. R. 322; Myers v. Hattger, 98 Mo. 433, 439, 11 S. W. R. 974; Hegney v. Head, 126 Mo. 619, 628, 29 S. W. R. 587; Maddox v. Maddox, 114 Mo. 85, 47, 21 S. W. R. 499; McFadin v. Catron, 88 S. W. R. 932, 120 Mo. 252; In re Mitchell, 43 Minn. 73, 76, 44 N. W. R. 885; Aylward v. Briggs (Mo., 1898), 47 S. W. R. 510; Farmer v. Farmer (Mo., 1898), 31 S. W. R. 926; Jackson v. Hardin, 83 Mo. 185; Bennett v. Bennett, 50 N. J. Eq. 439, 26 Atl. R. 573; Dumont v. Dumont, 46 N. J. Eq. 223, 236, 19 Atl. R. 467; In re Mabie, 5 Misc. R. 179, 24 N. Y. Supp. 855, 858; In re Voorhis, 7 N. Y. S. 596, 599, 54 Hun, 637; Stein v. Wilzinski, 4 Redf. (N. Y.) 450; In re Hall's Will, 50 Hun, 606, 3 N. Y. Supp. 288; In re Lyddy, 5 N. Y. Supp. 636; Barbour v. Moor, 4 App. D. C. 535; In re Lazak, 10 N. Y. Supp. 844, 845; In re Finn, 22 N. Y. Supp. 1066, 1067, 1 Misc. R. 280; In re Skaats, 74 Hun, 462, 26 N. Y. Supp. 494; In re Suydam, 32 N. Y. Supp. 449, 84 Hun, 514; In re Lang, 30 N. Y. Supp. 388, 9 Misc. R. 521; In re Journeay, 44 N. Y. Supp. 548; Horn v. Pullman, 72 N. Y. 269, 278; Marx v. McGlynn, 88 N. Y. 357, 374; In re White, 15 N. Y. St. R. 753; In re Tracy, 11 N. Y. St. R. 103; Potter v. McAlpine, 3 Dem. Sur. 103; In

re Mondorf, 110 N. Y. 450; Aid Society v. Loveridge, 70 N. Y. 387; Hurley v. O'Brien (Oreg., 1898), 54 Pac. R. 94; In re Murray's Estate, 11 Pa. Co. Ct. R. 263; Sharpless' Appeal, 134 Pa. St. 250, 19 Atl. R. 636, 26 W. N. C. 126; Foster v. Dickinson, 64 Vt. 233, 249, 24 Atl. R. 253; Kaufman v. Caughman, 49 S. C. 159, 170, 27 S. E. R. 16; Mackall v. Mackall, 135 U. S. 171. Apparently unjust discrimination by the testator in favor of two of his sons, who were strong and in good health, as against other sons who were both physically and mentally helpless, together with the old age and infirmity of the testator himself, raises no presumption of undue influence. Maddox v. Maddox, 114 Mo. 85 (1892), 21 S. W. R. 499. It is always competent to show the testator was on bad terms with his children or with those who would naturally expect to be benefited by his will; and, where this is shown, any facts may also be shown which tend to prove that the antipathy was based upon the bad conduct of the latter, and was not a mere insane delusion or unreasonable prejudice. In re Foster's Estate (1891), 142 Pa. St. 62, 21 Atl. R. 798. Cf. ante, § 94.

¹Chandler v. Jost, 96 Ala. 596, 11 S. R. 636; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. R. 493; Zimlich v. Zimlich, 90 Ky. 657, 661.

²In re Hollahan, 5 N. Y. Supp. 342.

of those who both by nature and the ties of kinship have some claim upon his bounty, that he makes an unequal division of his property among his children, or leaves his property to remote kin, excluding those who are more closely related, though they create no presumption of undue influence in law, are facts which may, in connection with other facts, indicate or tend to show undue influence.

§ 136. Evidence to explain the apparently unjust character of the will.—The jury have a right to consider the unjust and unnatural character of the will, and the fact that the testator discriminates in disposing of his estate.¹ The weight of such evidence is for them exclusively. It may create a suspicion that the will was not voluntarily executed, and it is but reasonable, at least where the distribution is not only unequal, but manifestly unjust and unnatural, to require that some explanatory evidence shall be offered.² And generally any evidence which shows or tends to show why the testator slighted some of his relations and preferred others is competent.³

It is relevant to prove that the testator, when making his will, took into consideration the financial condition of the legatees and of those who are contesting probate. A seemingly inequitable or unnatural distribution of his property among his children, or other relations having apparently equal claims upon his bounty, may be explained by his having knowledge that those whom he has not favored were already amply provided for pecuniarily. Hence it may usually be shown that a contestant was in good circumstances to account for his not being provided for by the testator.⁴ And, on the other hand, the poverty of the legatee may be proved to account for his preference over other persons related to the testator in the same degree.⁵ Accordingly, where the testator leaves his prop-

¹ *Nicewander v. Nicewander*, 151 Ill. (1894), 136, 87 N. E. R. 698; *In re Blair's Will*, 16 N. Y. Supp. 874. See cases in note 4, page 191.

² *In re Budlong*, 54 Hun, 181, 7 N. Y. Supp. 289.

³ *Foster v. Dickinson*, 24 Atl. R. (1891), 253, 64 Vt. 283.

⁴ *Sim v. Russell* (Iowa, 1897), 57 N. W. R. 604.

⁵ *Thompson v. Ish*, 99 Mo. 160, 12 S. W. R. 510. *Contra*, *In re Kaufman's Estate* (Cal., 1899), 49 Pac. R. 192. But evidence that the person who is alleged to have exerted the undue influence was penurious is irrelevant. *Estate of Calkins* (Cal., 1898), 44 Pac. R. 577.

erty to a stranger, to the exclusion of his relatives, it may be shown that he had been ill-treated by his relatives, and that he was not on good terms with them, while the stranger had been kind to him, and had administered to his physical welfare and comfort, or had aided him from a business standpoint.¹ And the court may compel a legatee, who has received the bulk of the estate disposed of in the will "as a just reward for his faithful care" of the property of the testator, to produce his books of account kept while he was acting as the agent of the testator.²

§ 137. The will drawn by or under the direction of a beneficiary or the executor.—The fact that the person who drew a will for the testator, or who was active in procuring and superintending its execution, is named as a beneficiary in it, was sufficient to make the instrument invalid at the Roman civil law.³ But the common law does not go to such an extreme as this.⁴ Upon the question whether the circumstance that the draughtsman of the will receives a benefit under it raises a presumption of undue influence sufficient to cast the burden of proof upon the proponent to show the entire absence of undue influence, the decisions are irreconcilably inharmonious.

Many cases seem to hold that the circumstance that a party draws a will, or actively superintends its execution, under which he takes a legacy, *alone* and without positive proof of the active procurement of the benefit, raises a presumption of undue influence exerted by him which must be rebutted by clear and satisfactory evidence. He has then, according to these authorities, the burden of proof to show that the will was voluntarily executed, and that the testator, when he signed it, had an adequate knowledge of its contents.⁵

The fact that the party superintending the execution of the will, or the person who propounds it for probate, takes a large

¹ Denning v. Butcher, 91 Iowa (1894), 425, 59 N. W. R. 69; Foster v. Dickerson, 64 Vt. 232, 249. See also cases in note 4, page 191.

² Richmond's Appeal, 59 Conn. (1890), 226, 22 Atl. R. 82.

³ Dig. 48, tit. 10, secs. 15, 34.

⁴ Crispell v. Dubois, 4 Barb. (N. Y.) 393, 398.

⁵ Drake's Appeal, 45 Conn. (1877), 9, 15, 16; Beall v. Mann (1848), 5 Ga. 456; Hughes v. Meredith (1858), 24 Ga. 52; Duffield v. Robeson, 2 Har. (Del.) 375, 384. See cases in next note, and *post*, § 145.

benefit under it, is a circumstance raising a suspicion of undue influence. It must then be shown to the satisfaction of the court that the testator did in fact know and approve of the contents of the will. Upon this point the evidence must be clear, affirmative and conclusive.¹ The amount and quality of the proof which in any case will convince the court that the testator did not know the contents of the will depend, as has been said, upon the facts of the case. The testimony of persons who were present when the will was executed, to the effect that it was not read by or to the testator, coupled with evidence that the testator inquired several times if it had been written as he directed, may be sufficient to show that he did not know what it contained.² And if under such circumstances the draughtsman is a beneficiary the will may be set aside.

But the safer and more correct statement of the rule is that such a condition of affairs creates no presumption, but merely raises a suspicion which ought to appeal to the vigilance of the court. Such wills are certainly not looked upon with favor. The court will cautiously and carefully examine into the circumstances which were attendant upon their execution, and will scan with a scrutinizing eye the evidence offered to procure their probate. No presumption of undue influence invariably arises from the fact that a will is drawn by a beneficiary under it, which is sufficient to cast the burden of showing the absence of influence upon the proponent. It is a fact to be considered with other facts. It is undoubtedly a suspicious fact, but its weight depends, not solely upon its character, but upon the facts and circumstances with which it is connected. In some cases it would have no weight at all. Thus, if it appear that the testator had testamentary capacity, that he dictated his will and knew its contents at the date of its execution, and that it was executed in the statutory manner, the mere fact that the will was written by the sole beneficiary would not be enough, unless coupled with other extremely suspicious facts, to overthrow it, or, taken alone, to cast the slightest suspicion upon it.³

¹ *Brown v. Fisher*, 68 *Law Times*, 405; *In re Graf's Will*, 81 *N. Y. Supp.* 682, 10 *Misc. R.* 298.

² *Keithley v. Stafford*, 126 *Ill.* 507, 18 *N. E. R.* 740.

³ *Carter v. Dixon*, 69 *Ga.* (1882), 82; *Simpler v. Lord*, 28 *Ga.* 52; *Stirling v. Stirling*, 64 *Md.* 138, 147, 21 *Atl. R.* 273; *Griffith v. Dieffenderffer*, 50 *Md.* 466 (1878); *Harvey v. Sullens*, 46 *Mo.*

And, *a fortiori*, the fact that a testator, in full possession of his faculties, disposing of a large estate to those who, by nature or affection, are presumed to have claims upon his bounty, deemed it proper to leave a legacy of a moderate amount to

147, 151 (1870); *Carpenter v. Hatch*, 64 N. H. 573, 576, 15 Atl. R. 219; *Bennett v. Bennett*, 50 N. J. Eq. 439, 447, 26 Atl. R. 573; *Rusling v. Rusling*, 36 N. J. Eq. 603, 609; *Howell v. Taylor*, 50 N. J. Eq. 428, 26 Atl. R. 506; *Leacroft v. Simmons*, 3 Bradf. (N. Y.) 35; *Lee v. Dill*, 11 Abb. Prac. R. (N. Y.) 218; *In re Welch*, 5 Bradf. 244; *De lafield v. Parish*, 25 N. Y. 35 (1862); *In re Skaats' Will*, 26 N. Y. Supp. 404, 74 Hun, 462; *Coffin v. Coffin*, 28 N. Y. 9, 18 (1861); *Tyler v. Gardiner*, 35 N. Y. 559, 595; *Crispell v. Dubois*, 4 Barb. 393, 398; *Loder v. Whelpley*, 18 N. E. R. 874, 111 N. Y. 239, 250, 16 Civ. Pro. R. 89; *Clarke v. Ochell*, 84 Hun, 28, 32, 81 N. Y. Supp. 1053; *In re Suydam's Will*, 33 N. Y. Supp. 449, 84 Hun, 514, 515; *Smith's Will*, 95 N. Y. 516; *In re Reed*, 20 N. Y. Supp. 91, 2 Con. Sur. 403; *Sheldon's Will*, 16 N. Y. Supp. 454; *Blume v. Hartman*, 115 Pa. St. 32, 39, 8 Atl. R. 219; *Miller v. Oestrich*, 27 Atl. R. 742, 157 Pa. St. 264, 276; *Patton v. Alison*, 7 Humph. (26 Tenn.) 320. The fact that the draughtsman of a will, who is a legatee at the same time, stands in a confidential relation to the testator, does not, in the absence of affirmative proof of fraud or coercion, raise a presumption against the voluntary character of the will. In the well-considered case of *Barr v. Butlin*, 1 Curt. 637, on page 651, the court, in pronouncing judgment by Parke, Baron, says: "It is said that where the party benefited prepares the will, the presumption and *onus probandi* are against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper, and that where the capacity is doubt-

ful there must be proof of *instruction or reading over*. If by these expressions the learned judge meant merely to say that there are cases of wills prepared by a legatee so pregnant with suspicion that they ought to be pronounced against in the absence of evidence in support of them, and *that* extending to clear proof of the actual knowledge of the contents by the supposed testator, and that instructions proceeding from him, or the reading over of the instrument by or to him, are the most satisfactory evidence of such knowledge, we fully concur in the proposition so understood; in all probability the learned judge intended no more than this. But if the words used are to be construed strictly, if it is intended to be stated as a rule of law that in every case in which the party preparing a will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species, of proof is therefore required from the party propounding the will, we feel bound to say that we conceive the doctrine to be incorrect. The strict meaning of the term '*onus probandi*' is this: that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the *onus* is on the party propounding the will; it is in general discharged by proof of capacity and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed; and it cannot be that the simple fact of the party who prepared the will being himself a legatee is in every case, and under all circumstances, to create a contrary presumption, and

the professional person who drew his will, or to the medical attendant who had assiduously cared for him during his illness, is not enough to compel the proponent to show that the legacy was not improperly procured.¹

On the other hand, these circumstances would have great importance and weight where the testator was very old and decrepit, or where the party interested in procuring the will had, for a long period, occupied confidential relations towards him. Thus, if the testator is an old and feeble man, unable to devote his attention to the active management of his estate, and if he had for some time prior to the execution of the will permitted the legatee to exercise an exclusive and complete control of all his property, the drawing of a will in his own favor by the confidential agent, to the total exclusion of the claims of members of the testator's family, would be a circumstance of the greatest suspicion. The presumption of fraud and of undue influence would, in such a case, be almost irresistible. But it is still a presumption of fact and may be rebutted. The clearest evidence would be required from the proponent, extending much further than mere proof of due execution and acquaintance with the contents of the will.²

to call upon the court to pronounce against the will unless additional evidence is produced to prove the knowledge of its contents by the deceased. . . . All that can truly be said is that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance of more or less weight, according to the facts of each particular case; in some, of no weight at all, varying according to the circumstances; for instance, the *quantum* of the legacy and the proportion it bears to the property disposed of and other numerous contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the

instrument did express the real intentions of the deceased. Now, can it be necessary that *in all such* cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for or reading over the instrument. They form, no doubt, the most satisfactory, but they are not the *only* satisfactory, description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The court would naturally look for such circumstances in evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it."

¹ *Cf. post*, § 146.

² *Wood's Ex'r v. Devers* (Ky.), 19 S. W. R. 1; *Harvey v. Sullens*, 46 Mo. (1870), 147, 151; *Crispell v. Dubois*, 4

§ 138. The relevancy of the physical weakness or illness of the testator to show incapacity and undue influence.—In determining whether the testator possessed testamentary capacity, his soundness of mind, rather than his physical health or physical soundness, is the fact to be taken into consideration. Very many persons delay the execution of a will until some severe physical ailment or accident overtakes them, when of course their bodily faculties are overcome or debilitated by sickness or pain.

But physical weakness, whether arising from injuries caused by accident, or from illness or old age, while material to be considered upon the question of capacity¹ and of undue influence, is not conclusive as to either. It is well settled that a person may enjoy full testamentary capacity while he is suffering from extreme physical weakness or from the violence of disease. He may have been in an extreme state of weakness, bedridden and speechless, utterly unable to move his limbs or to raise his hands to grasp the pen with which the signature to the will is made, and yet execute a valid will. The force of evidence of a physical ailment depends somewhat upon the nature of the disease, but principally upon its effects on the mind of the testator. It is very possible that a person in the condition of physical helplessness above described would be a fit object for the practice of fraud or undue influence, and that

Barb. (N. Y., 1848), 893; *Tyler v. Gardiner*, 35 N. Y. 559; *Newhouse v. Godwin*, 17 Barb. (N. Y., 1854), 236, 259; *Yardley v. Cuthbertson*, 108 Pa. St. 895; *In re Slinger*, 72 Wis. 22, 35; *Parker v. Duncan*, 62 Law Times, 642; *Paske v. Ollat*, 2 Phil. 423. A person, whether an attorney at law or not, who is requested by the testator to draw his will, ought to be exceedingly cautious in what he says and does while he is in the presence of the testator, in order that he may not, in the slightest degree, influence the mind of the latter to make a will which does not speak his deliberate and freely-formed intention. He may, consistently with a proper performance of the duties which confront him, question the testator at

length in order to develop more fully the testator's intention. He may suggest the proper language, in order that such intention may clearly appear in intelligible language. He may call the attention of the testator to the natural claims of those who are of his own blood, or may point out other persons as worthy objects of his bounty. All this is legitimate; provided, after the suggestions have been made, the mind and intention of the testator are permitted to operate freely, and no sinister influence is exerted which will result in producing a testament which is not the outcome of the testator's free volition.

¹ *Ante*, §§ 86, 113.

a will might be extorted more readily from him by such influence than in the case of a man in robust physical condition. And, as bearing upon the question of testamentary capacity, the fact of his illness, if its nature was such as to produce mental derangement or delirium, or to cause him to lapse into fits of unconsciousness, may be particularly proper to be considered by the jury, with other evidence, as proof of incapacity.¹

§ 139. The physical condition of the testator at the time of execution.—It is not necessary to show that actual violence or physical force was employed in procuring the will.² Coercion amounting to undue influence may exist where the only pressure felt is that which is upon the mind of the testator. Terrors afflicting and affecting the powers of the imagination will frequently deprive a man of his free agency. It is a well known fact that the strength and vigor of the will and the condition of the mental powers are largely dependent upon the physical condition of the individual. If a man's physical frame is weakened by old age or debilitated by a long and lingering illness, or racked by excruciating pain, it is in vain to expect from him that mental vigor and attention to his affairs, or that independent spirit in managing and arranging them, that we find present in one who is physically strong and vigorous.

Hence the physical condition of the deceased is always relevant.³ It may be shown that he was in feeble health when he executed the will, and that he had been suffering from illness for some time prior thereto. For it is well established that the conduct of a person, himself in vigorous bodily strength, to-

¹ *Henry v. Hall*, 106 Ala. 84, 98, 17 S. R. 187; *Campbell v. Carnahan* (Ark., 1890), 13 S. W. R. 1098; *Epling v. Hutton*, 121 Ill. 555, 558, 13 N. E. R. 242; *Sims v. Russell*, 90 Iowa, 657, 659; *Torrey v. Blair*, 75 Me. 548, 551; *Crockett v. Davis*, 81 Md. 134, 81 Atl. R. 710; *O'Connor v. Madison*, 98 Mich. 185, 187, 57 N. W. R. 105; *Ayers v. Ayers*, 12 Atl. R. 621, 40 N. J. Eq. 565; *In re Ogden*, 2 N. Y. S. 345; *In re Schreiber*, 5 N. Y. S. 47; *In re McCarthy*, 20 N. Y. S. 582, 587, 65 Hun, 624; *In re Patterson*, 59 Hun, 624, 26 Abb. N. C. 395, 13 N. Y. S. 463, 464; *In re Mahoney*, 58 Hun, 608, 12 N. Y. S. 122; *Jackson v. Jackson*, 39 N. Y. S. 153, 157; *In re Seagrist*, 32 N. Y. S. 1095, 11 Misc. R. 188; *Johnson v. Cochrane*, 91 Hun, 165, 36 N. Y. S. 283; *Cheney v. Price*, 37 N. Y. S. 117, 90 Hun, 238; *In re Buchan*, 16 Misc. R. 204; *In re Flansburgh*, 82 Hun, 49; *In re Douglass*, 162 Pa. St. 567, 29 Atl. R. 715; *Hull's Appeal* (Pa.), 19 Atl. R. 352; *Tucker v. Sandidge*, 85 Va. 546, 567, 8 S. E. R. 650; *Martin v. Thayer*, 37 W. Va. 38, 52, 16 S. E. R. 489.

² *Estes v. Bridgforth* (Ala., 1897), 21 S. R. 512.

³ *Ante*, § 138.

wards another who is ill, though mentally sound, may so intimidate the latter and fill his mind with fear that he passes under the complete control of the former. But physical weakness alone, whether the result of old age or produced by illness, is never conclusive on the question of undue influence.¹

But evidence of the fact that when he executed the will the testator was seriously ill, and that he was very feeble physically as the result of old age or disease, in connection with other facts, as, for example, that the will was not read to him, or that it was drawn up by the principal legatee under it, may justify a finding that it was procured by undue influence.²

§ 140. Habitual drunkenness as bearing upon undue influence.—The fact that the testator was addicted to the excessive and habitual use of intoxicating liquors, or of morphine or similar drugs, and was frequently under their influence, are circumstances which, while they are relevant to the issue of undue influence, are never controlling. Alone, they have little pertinency. If the testator was under the influence of intoxicating drink at the precise time of the execution of the will, so that he was deprived of the power to resist the pressure exerted upon him to procure a will, the will should be set aside³ as the product of undue influence.⁴

§ 141. The knowledge of the contents of the will and its reading by the testator.—Evidence is always admissible under

¹Collins v. Brazill, 63 Iowa, 434, 495 (1884), 18 N. R. 338; In re Farnsworth, 62 Iowa, 474, 479 (1888); Maddox v. Maddox, 114 Mo. 35 (1890), 21 S. W. R. 499; Stoutenburgh v. Hopkins, 43 N. J. Eq. 577, 12 Atl. R. 689; Snelling's Will, 136 N. Y. 515, 32 N. E. R. 1006; In re Green's Will, 20 N. Y. Supp. 538, 22 N. Y. Supp. 1112, 67 Hun, 527; In re Williams, 2 Con. Sur. 579, 15 N. Y. Supp. 328; Blume v. Hartman, 115 Pa. St. 32, 8 Atl. R. 219; Kaul v. Brown, 17 R. I. 14, 20 Atl. R. 10.

²Purdy v. Hall, 134 Ill. 298, 25 N. E. R. 645 (1890); In re Bartholick's Estate, 59 Hun, 616, 12 N. Y. Supp. 640; In re Armor's Estate, 154 Pa. St. 517 (1893), 32 W. N. C. 269, 26 Atl. R. 619; Walters v. Walters, 89

Va. 849, 17 S. E. R. 515. Testator was in a stupor, dying, and the pen was placed in his hand and a mark made for him by the draughtsman. If the evidence for the contestant shows that the testator was physically weak or ill, the proponent may introduce evidence to show that he was in good state of health and activity about the time when the will was executed. Denny v. Pinney's Heirs, 60 Vt. 524, 12 Atl. R. 108.

³Slinger v. Calverly, 72 Wis. 22, 37 N. W. R. 236; Gay v. Gillilan, 92 Mo. 250, 5 S. W. R. 7; In re Ely's Will, 16 Misc. R. (N. Y.) 228.

⁴As to the testamentary capacity of habitual drunkards, see *ante*, § 108 et seq.

an issue of undue influence to show that the will was not read to the testator, and that he did not know its contents, as tending to show that the writing does not contain his intentions.¹ It must appear satisfactorily that the deceased knew the contents of the instrument which is offered for probate as his will, though the amount of evidence required, its nature and the degree of proof will depend altogether upon the circumstances of the case.

If it appears that the testator was in good physical and mental health, that he possessed a fair education and intelligence and was in possession of his faculties, and that at the time of execution he was not likely to have been unduly influenced, it may be presumed that he was acquainted with the contents of his will, and that it met with his approval. Under these circumstances an actual reading of the will to him need not be proved, if from evidence it appears that he knew its contents. It is a fair presumption, recognized by the law, that if a man of intelligence executes with due formalities an instrument of so solemn a nature as a will, he knows its contents. This presumption is strengthened and, in the absence of rebutting facts, rendered conclusive by evidence that the language of the paper which is offered as his will agrees in substance with the instructions given by the testator.²

If, however, it appears from the evidence that mental capacity was not perfect, that the testator was blind,³ illiterate or weak-minded; that he did not understand the language in which the will was written, or if circumstances are shown from which, alone or in connection with others, the court may reasonably infer the existence of undue influence, the presump-

¹ *Wilbur v. Wilbur*, 188 Ill. 446 (1891), 27 N. E. R. 701; and see cases cited in next note.

² *Taylor v. Cox*, 153 Ill. 220 (1891), 38 N. E. R. 656; *Barnes v. Barnes*, 66 Me. 286, 296; *Pettes v. Bingham*, 10 N. H. 514, 515 (1840); *Harris v. Vanderveer*, 21 N. J. Eq. 561; *Day v. Day*, 8 N. J. Eq. (1831), 549; *Patton v. Hope*, 37 N. J. Eq. (1883), 522, 528; *In re Hall*, 24 N. Y. Supp. 864, 5 Misc. R. 461; *In re Smith's Will*, 24 N. Y. Supp. 928; *In re Seagrist's Will*, 32 N. Y. Supp. 1095, 11 Misc. R. 188; *In re Crumb's Will*, 2 N. Y. Supp. 744; *Franke v. Shipley*, 22 Oreg. 104; *Blume v. Hartman*, 115 Pa. St. 32 (1887), 8 Atl. R. 219; *Comb's Appeal*, 105 Pa. St. 155; *Vernon v. Kirk*, 30 Pa. St. (1858), 218; *McNinch v. Charles*, 2 Rich. (S. C.) L. 229, 237; *Key v. Holloway*, 7 Baxt. (66 Tenn., 1874), 575, 577, 1 Amer. Prob. R. 360, 363; *Harrison v. Rowan*, 3 Wash. C. C. 580.

³ *Ante*, § 118.

tion that the testator was acquainted with the contents of the instrument is overcome. A more satisfactory degree of proof is then required. The court cannot infer that the testator was acquainted with the contents of the will merely from the fact of its due execution. But, even in the case of a blind testator,¹ it need not be shown that the will was *actually read over to him prior to its execution*. But in every case of doubt the burden of proof is upon the proponent to show, by some evidence which will satisfy the court, that the testator has been fully acquainted with the contents of the instrument which purports to be his will.²

The fact that the testator knew the contents of his will may be inferred from proof that it was actually read to him in the hearing of a witness, or from its being drawn in conformity with his instructions, from his admission that he had heard it

¹ *Ante*, § 118.

² *Chandler v. Ferris*, 1 Harr. (Del.) 454, 464; *Martin v. Mitchell*, 28 Ga. 382, 384; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. R. 740; *Gerrish v. Nason*, 22 Me. 438, 441 (1843); *Wampler v. Wampler*, 9 Md. 540, 550; *Swett v. Boardman*, 1 Mass. 258; *Worthington v. Klemon*, 144 Mass. 167; *Waite v. Frisbie*, 48 Minn. 420, 51 N. W. R. 217, 45 Minn. 361, 47 N. W. R. 1069; *Harris v. Vanderveer's Ex'r*, 21 N. J. Eq. 561, 570; *Day v. Day*, 3 N. J. Eq. 549; *Patton v. Hope*, 37 N. J. Eq. 522, 527; *Stewart v. Lisenard*, 26 Wend. (N. Y.) 255; *In re Graff's Will*, 31 N. Y. Supp. 682, 10 Misc. R. 293; *In re White's Will*, 52 Hun. 613, 5 N. Y. Supp. 295, 300; *In re Lansing's Will*, 49 Hun. 610, 2 N. Y. Supp. 117, 118; *Downey v. Murphey*, 1 Dev. & Bat. (17 N. C.) 82, 89; *Tomkins v. Tomkins*, 1 Bailey (S. C.), Eq. 92; *M'Ninch v. Charles*, 2 Rich. L. (S. C.) 229, 237. "In this case it is without question that the testator did not read the will himself. It was not in his possession so as to afford him an opportunity; and, if it had been, he was so weak and low as to be unable to do it. It is also clear that it was not

read over to him. It must, then, be shown to the satisfaction of the court that he was in some other way made acquainted with the contents of the instrument and approved them. In this case the presumption of law fails, and it becomes the duty of the person offering the will to show that the contents of the paper were fully made known to the testator. So, if the testator is incapable of reading the will, whether the incapacity arises from blindness, sickness or any other cause, the rule is the same, and the burden of proof is thrown on the person offering the will." By the court in *Day v. Day*, 3 N. J. Eq. 549, on page 552. Proof of due execution raises a rebuttable presumption that the testator was familiar with its contents. But where the will was executed under circumstances that create a suspicion of undue influence, the evidence must show *affirmatively* that he had a full knowledge of what the will contained and that its provisions are in accordance with his intentions. *Lake v. Ranney*, 33 Barb. (N. Y.) 49; *Comstock v. Hadlyme*, 8 Conn. 254.

read,¹ or from any circumstances which would induce a reasonable man to believe he knew of it. The proof depends very much upon the circumstances of each case, according to the simplicity or complexity of the provisions of the will, the intelligence and mental vigor of the testator, and the suspicious circumstances, if any, indicating fraud.

§ 142. Wills of foreigners written in the English language.—In the cosmopolitan population which inhabits the United States, instances of wills written in a language not habitually spoken by the testator, and which is perhaps imperfectly understood by him, are numerous. It is not essential that the testator should be able to read his will, whether his inability results from blindness, from illiteracy, or from his ignorance of the language in which it is written. But in the case of a foreigner whose knowledge of the language in which the will is written is shown to have been imperfect, it is always necessary to show that he was acquainted with its contents; and, if its provisions are complicated or involved, that they were fully explained to him before execution. Obviously the best method of acquainting a foreign-born testator, who has an imperfect knowledge of English, with the contents of a will written in that language, is by permitting him to read a properly made written translation in his native tongue. If this is not procurable, an oral translation, or even a succinct summary of its material provisions in his own language, made to him by some one in whom he can confide, may suffice.²

The fact that a will written in English, executed by a foreigner who was imperfectly acquainted with that language, is translated to him by one who is to receive a substantial benefit under it, creates no presumption unfavorable to the will. But this calls for a cautious and careful scrutiny of the evidence, in order to ascertain if the translation was accurately made and in good faith.³

§ 143. The influence of kindness and affection.—A will which is solely the result of kindness and good nature, showing

¹ *McCommon v. McCommon*, 151 Ill. 428, 88 N. E. R. 145.

² *Goerke v. Goerke*, 80 Wis. 516, 522, 50 N. W. R. 345; *Graf's Will*, 31 N. Y.

³ *In re Walter*, 64 Wis. 487, 491, 492; *S. 682*, 10 Misc. R. 293.
Estate of Steigert, 7 N. Y. Law J. 1334.

themselves in acts of attention and services on the part of the beneficiary towards the testator in caring for him or in attending to his needs in sickness or in health, is not procured by undue influence. The law recognizes and encourages the devotion of children to their parents, prompts the young to alleviate and assuage the necessities of the aged, and favors the kind attention of those who are well and strong to the sick and feeble in body or mind. It recognizes also, though in many instances such meritorious deeds, whereby the sufferings of the aged and feeble are alleviated by those among whom they are placed, are actuated solely by unselfish motives, that motives of self-interest are the strongest which can actuate the human heart. It considers that such motives should be recognized and permitted to have their appropriate action. There can be nothing improper or savoring of undue influence if the persons who are brought in contact with the testator are prompted to minister to him by reason of an expectation that he will leave them a portion of his property by will. And if the testator, prompted by gratitude for past or present kindness, and wishing to make a pecuniary return for what he has received while in life, though he may be under no legal obligation to do so, shall dispose of his property for the benefit of a person who has been kind to him, and, in doing this, acted freely and voluntarily, it is not a case of undue influence.¹

¹ *McCulloch v. Campbell*, 49 Ark. 367, 371, 5 S. W. R. 590; *Wilcoxon v. Wilcoxon* (Ill., 1898), 46 N. E. R. 369; *Calvert v. Davis*, 5 Gill & J. (Md., 1883), 301; *Barnes v. Barnes*, 66 Me. 286, 296; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. R. 69; *Carl v. Gabel*, 120 Mo. 288, 297, 25 S. W. R. 214; *Norton v. Paxton*, 110 Mo. 455, 467; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. R. 510; *Campbell v. McGuignan*, 84 Atl. R. 383 (N. J. Eq., 1898); *Clifton v. Clifton*, 47 N. J. Eq. 227, 244 (1890); *Hampton v. Westcott*, 49 N. J. Eq. 522 (1892); *White v. Starr*, 47 N. J. Eq. 244, 20 Atl. R. 875 (in this case the sole beneficiary had furnished her father, the testator, with a home in his old age, when he supposed his fortune was irretrievably lost, while his sons stood aloof); *In re Harold's Will*, 3 N. Y. Supp. 310 (1888), 50 Hun, 606; *In re Webb's Will*, 83 N. Y. Supp. 968, 87 Hun, 57 (a gift "out of respect for the legatee for her services and kindness, with the expectation that she will remain with me as long as I live"); *In re Williams' Will*, 64 Hun, 606, 19 N. Y. Supp. 778; *Carpenter v. Hall*, id.; *In re Halbert*, 15 Misc. R. 308; *Creely v. Ostrander*, 2 Bradf. (N. Y.) 107; *In re Lewis' Estate*, 140 Pa. St. 179, 185, 21 Atl. R. 242; *Appeal of McCaully*, 180 Pa. St. 480, 483 (1889), 18 Atl. R. 617; *Tawney v. Long*, 76 Pa. St. 115 (1874); *Trost v. Dingler*, 118 Pa. St. (1888), 259; *Foster's Ex'rs v. Dickerson*, 64 Vt. 233 (1891), 24 Atl.

§ 144. The influence of flattery, persuasion and importunity.—Every influence which is brought to bear by a legatee upon the mind of the testator, by means of which the former secures a benefit, is not necessarily undue. The employment of argument or persuasion, directed to the understanding; of flattery, addressed to the feeling of self-esteem, or of appeals to the affection or pity of the testator, will not constitute undue influence sufficient to vitiate a will which, upon the whole, appears to be the outcome of the free agency of the testator. Honest intercession and solicitation, though insistent and continuous during the period covering the execution of the will, if they do not result in coercing the testator into making a will which he would not have made voluntarily, are not undue influence. It is only when such pressure results in subverting the will of the testator to that of another that it is undue influence.

Neither advice nor argument nor persuasion would vitiate a will made freely and from conviction, though the will might not have been made but for such advice and persuasion. Gratitude and affection growing out of benefits conferred or being conferred; esteem and friendship, the result of admiration for another's character, are allowed to have their proper operation upon the mind and volition of the testator. He has a right to keep his mind and heart open to the sweet influences of social ties and to the promptings of the natural love which he may have for those of his own blood. On the other hand, he has a right to listen to the suggestions and solicitations of persons not of his kindred, which have for their object the procurement of testamentary benefits at his hands. He may lawfully permit himself to be influenced by motives of friendship; he has a right to remember the claims of those from whose hands he has received favors during his life-time; he may permit himself to be influenced by all these motives, or by requests based upon his gratitude for the past benefits or present comforts enjoyed by him. His will should be sustained if, after listening to and deliberating upon the appeals and solicitations, his mind is free from restraint and coercion, and he is at liberty to act freely upon them, to acquiesce in or to re-

R. 253; Kerr v. Lumsford, 8 S. E. R. Jarrett, 11 W. Va. (1877), 884; Nicholas v. Jarrett, 31 W. Va. 659, 680; Jarrett v. las v. Kershner, 20 W. Va. (1882), 251.

ject them, and his will, when it is executed, speaks his own mind and intention, voluntarily formed, and not those of another person or persons.¹

§ 145. The effect of confidential relations between the testator and a beneficiary.—In spite of some uncertainty and lack of harmony in the decisions, it is undoubtedly a sound rule,

¹ *Eastis v. Montgomery*, 93 Ala. 293, 9 S. R. 311; *McDaniel v. Crosby*, 19 Ark. 533; *Rogers v. Diamond*, 13 Ark. 474 (1853); *Chandler v. Ferris*, 1 Harr. (Del.) 454, 464; *Potts v. House*, 6 Ga. 324, 359; *Smith v. Henline*, 51 N. E. R. 227, 174 Ill. 184; *Roe v. Taylor*, 45 Ill. 485; *Bevelot v. Lestrade*, 153 Ill. 625; *Rutherford v. Morris*, 77 Ill. (1875), 397; *Allmon v. Pigg*, 82 Ill. 149 (1876); *Robb v. Graham*, 43 Ind. (1873), 1; *Bundy v. McKnight*, 48 Ind. 502; *McIntire v. McConn*, 28 Iowa, 480, 486; *Harrison's Will*, 1 B. Mon. (40 Ky., 1840), 351-353; *Wise v. Foot*, 81 Ky. 10; *Elliott's Will*, 2 J. J. Marsh. (25 Ky.) 840; *Barlow v. Waters*, 89 Ky. 393, 28 S. W. R. 785; *Small v. Small*, 4 Me. 220; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 284; *Lewis v. Mason*, 109 Mass. 169, 174; *Glover v. Hayden*, 4 Cush. 580; *Maynard v. Vinton*, 59 Mich. (1886), 189, 153; *Sullivan v. Foley* (Mich., 1898), 70 N. W. R. 322; *Schofield v. Walker*, 58 Mich. 96; *Aylward v. Briggs* (Mo., 1898), 47 S. W. R. 510; *Jones v. Roberts*, 37 Mo. App. 163; *Young v. Ridenbaugh*, 67 Mo. 574, 1 Amer. Pro. R. 378, 387; *Humphrey's Will*, 26 N. J. Eq. (1875), 513; *Collins v. Osborn*, 34 N. J. Eq. (1881), 511; *Dumont v. Dumont*, 46 N. J. Eq. 223; *Gleespin's Will*, 26 N. J. Eq. 523; *Den v. Gibbons*, 23 N. J. L. (1852), 117; *In re Eddy*, 32 N. J. Eq. 701; *Clarke v. Schell*, 81 N. Y. Supp. 1053, 84 Hun, 23, 31; *In re Journeay*, 80 Hun. 815; *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236; *In re Jacott*, 49 Hun, 608, 2 N. Y. Supp. 146; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387, 394; *Gardiner v. Gardiner*, 34 N. Y. 155; *Tyler v. Gardiner*, 35 N. Y. 599; *Gilreath v. Gilreath*, 4 Jones (N. C. Eq.), 142; *Miller v. Miller*, 3 Serg. & R. (Pa.) 267, 269; *Hoge's Estate*, 2 Brewst. (Pa.) 450, 454; *Trost v. Dingles*, 118 Pa. St. 259, 12 Atl. R. 296; *Tawney v. Long*, 76 Pa. St. 106; *Lide v. Lide*, 2 Brev. (S. C., 1810), L. 403; *Trezevant v. Rains*, 85 Tex. 329; *Robinson v. Stewart*, 73 Tex. 267, 11 S. W. R. 275; *Carroll's Will*, 50 Wis. 437, 441; *Jackman's Will*, 26 Wis. 104; *Martin v. Teague*, 2 Speers (S. C., 1843), 269. "But all influences are not unlawful. Persuasion—appeals to the affections, or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate, and may be fairly pressed on the testator. On the other hand, pressure, of whatever character, whether acting on the fears or the hopes, if so exerted as to overcome the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist; moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort,—these, if carried to a degree in which the free play of the testator's judgment, discretion or wish is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition and not the record of some one else's." *Hall v. Hall*, 37 L. J. Prob. 40; *Chappell v. Trent*, 90 Va. 849, 19 S. E. R. 814.

sustained by the majority of the cases, that the existence of confidential relations between the testator and a beneficiary is not enough, *taken alone*, to raise a presumption of undue influence, if it also appears that the beneficiary was not active in procuring a benefit for himself.¹ The presence of undue influence must be proved. It will never be presumed to exist without evidence of some facts from which its existence may reasonably be inferred. The mere fact that a person who, during the life of the testator, occupied a confidential position towards him, is largely benefited by the will, does not, *alone*, cast the burden of proof upon the proponent to show the absence of undue influence as to a legacy to that person.²

¹ *Ante*, § 137.

² *Chandler v. Jost*, 96 Ala. 596, 11 S. R. 636; *Bancroft v. Otis*, 91 Ala. 279, 8 S. R. 286; *Eastis v. Montgomery*, 93 Ala. 293, 9 S. R. 311; *Appeal of Richmond*, 59 Conn. 226, 22 Atl. R. 82; *Ethridge v. Bennett*, 9 Houst. (Del., 1891), 295; *Appeal of Livingston*, 63 Conn. 68 (1893), 26 Atl. R. 470; *In re Hines* (Conn., 1898), 37 Atl. R. 384; *Rutherford v. Morris*, 97 Ill. 397, 414; *Hoerth v. Zable*, 92 Ky. 202; *Tyson v. Tyson*, 37 Md. 567; *Goodbar v. Lydikey*, 136 Ind. 1, 6, 35 N. E. R. 691; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. R. 69; *Patten v. Cilley* (N. H., 1898), 42 Atl. R. 47; *Wheeler v. Whipple*, 44 N. J. Eq. 141, 14 Atl. R. 375; *Braisted v. Weeks*, 5 Redf. (N. Y.) 529; *King v. Holmes*, 84 Me. 219, 24 Atl. R. 819; *In re Bernsee's Will*, 71 Hun, 27, 24 N. Y. Supp. 504; *In re Smith's Will*, 95 N. Y. 516; *In re Graf*, 64 N. Y. St. R. 807; *Riddell v. Johnson*, 26 Gratt. (Va.) 152, 175; *Cramer v. Crumbaugh*, 8 Md. 491 (1853); *Watterson v. Watterson*, 1 Head (38 Tenn., 1858), 1; *Adair v. Adair*, 30 Ga. 104; *Nexsen v. Nexsen*, 3 N. Y. (1850), 360; *Coffin v. Coffin*, 23 N. Y. 9; *In re Western's Will*, 60 Hun, 298, 14 N. Y. Supp. 753, distinguishing *Post v. Mason*, 91 N. Y. 539; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. R. 874, 16 Civil Pro. R.

89; *Clarke v. Schell*, 84 Hun, 28, 32, 31 N. Y. Supp. 1033; *In re Suydam's Will*, 84 Hun, 514, 515, 32 N. Y. Supp. 449; *In re Soule's Will*, 1 Con. Sur. 18, 18 Abb. N. C. 236, 3 N. Y. Supp. 259; *In re Read's Will*, 40 N. Y. Supp. 974, 17 Misc. R. 195; *Waddington v. Buzby*, 45 N. J. Eq. 173, 16 Atl. R. 690; *Brick v. Brick*, 44 N. J. Eq. 282, 18 Atl. R. 58; *Horan v. Knox*, 87 N. C. 483; *In re Hoopes*, 174 Pa. St. 373; *In re Spellier's Estate*, 2 Pa. Dist. R. 513; *Tallman's Will*, 9 Pa. Co. Ct. R. 357; *Douglass' Estate*, 162 Pa. St. 567, 574; *Herster v. Herster*, 123 Pa. St. 239, 259; *Parfitt v. Lawless*, L. R. 2 P. & D. 462, 468; *Bleeker v. Lynch*, 1 Bradf. 458; *Billinghurst v. Vickers*, 1 Phill. 187; *Paske v. Ollatt*, 2 id. 823; *Barry v. Butlin*, 1 Curt. 637; *Baker v. Batt*, 2 Moo. P. C. C. 317; *Hitchins v. Wood*, 2 id. 355, 436; *Goodacre v. Smith*, L. R. 1 P. & D. 359; *Cockroft v. Bowles*, 4 Notes Cases, 237. In the following cases it has been held that the existence of a confidential relation alone, aside from any other fact, created a presumption of undue influence calling on the proponent of the will to rebut it by clear, satisfactory and positive evidence: *Montague v. Allen*, 78 Va. 592; *Brown v. Bell*, 58 Mich. 58; *Bush v. Delano* (Mich.), 71 N. W. R. 628; *Donovan v. Bromley* (Mich.), 71 id. 523; *Lyon v.*

It is but natural that a person, when disposing of his property in anticipation of his decease, should give it to those with whom he is on terms of friendship and intimacy rather than to strangers. He will naturally remember the claims of his widow and his children; or, in case he shall leave no immediate family, he may be prompted by gratitude or affection to benefit those with whom he resides or with whom he is connected socially.

If the testator is well advanced in years and has grown-up sons, it is almost certain that he has, prior to his death, intrusted the management of at least a portion of his estate to one of them, who, by reason of the power and control over the property of the testator thus delegated to him, occupies a position of marked trust. Can it be said that a son who, under such circumstances, receives a large portion of his father's estate to the exclusion of another son, who has never manifested any ability or even inclination to care for the interests of his father, is called upon to show that he has not procured his legacy by fraud and undue influence?

Or is the legal adviser of the testator, by whose industry, experience and skill his property has perhaps been protected from the assaults of those who by fraud and trickery have endeavored to deprive him of it, called upon to rebut a presumption of undue influence because, prompted by gratitude and appreciation of his efforts, the testator has, out of a large estate, left him a small legacy? Such is not the rule that commends itself to the sense and reason of mankind. Indeed, some of the cases intimate rather strongly that the circumstance that the testator leaves his property to one with whom he has been intimately associated socially or in business is far less indicative of the presence of undue influence than if the testator had given his property to strangers.¹

But the relations existing between the testator and the beneficiaries may always be inquired into. And these relations, in connection with other facts, may raise a presumption of undue influence. Thus, where it appears from the evidence that the testator and the beneficiary stood in confidential relations to-

Dada (Mich.), 69 id. 163; Jones v. Roberts, 37 Mo. App. 163; Yardley v. Cuthbertson, 108 Pa. St. 395. ¹ Goodbar v. Lidikey, 136 Ind. 1, 6; In re Brooks, 54 Cal. 471.

wards one another, and it also appears that the legatee, whether the legal or medical adviser of the testator, or the confidential manager of his property, was the draughtsman of the will, or that he procured the services of the draughtsman and superintended the execution of the will, or gave instructions or made suggestions for drawing it, circumstances are shown from which a presumption of undue influence or fraud arises, which the proponent of the will has the burden of proof to overthrow, and to show that the will was the free and voluntary act of the testator.¹

¹ *Henry v. Hall*, 106 Ala. 84, 17 S. R. 187; *Higginbotham v. Higginbotham*, 106 Ala. 314, 17 S. R. 516, 517; *Lyons v. Campbell*, 88 Ala. 463, 7 S. R. 250; *Jones v. Simpson* (Mass., 1898), 50 N. E. R. 940; *Boisaubin v. Boisaubin*, 51 N. J. Eq. 252, 27 Atl. R. 624; *Carroll v. Norton*, 3 Brad. (N. Y.) 291; *Wilson v. Moran*, 3 Brad. (N. Y.) 172; *Mowry v. Silber*, 2 Brad. 183; *In re Baker*, 2 Redf. Sur. 169; *In re Soule's Will*, 1 Con. Sur. 18, 3 N. Y. Supp. 259; *Boyd v. Boyd*, 66 Pa. St. (1870), 283; *Cuthbertson's Appeal*, 97 Pa. St. 163 (1881); *Armor's Estate*, 154 Pa. St. 517; *Douglass' Appeal*, 162 Pa. St. 567, 568; *Whitelaw v. Sims*, 90 Va. 588 (1894), 19 S. E. R. 118. So the fact that the husband of the principal devisee was the confidential agent of the testator and had the exclusive control of his property, together with the fact that he engaged the attorney who prepared the will, may cast the burden of disproving undue influence upon the beneficiary. *Henry v. Hall*, 106 Ala. 84 (1894), 17 S. R. 187. Where a bequest by testator to his confidential agent is stated to be "a just reward for his faithful care of my affairs for many years," the value of the property which was under the care of the agent may be shown to illustrate the relations existing between the parties. *Appeal of Richmond*, 22 Atl. R. 83 (1890), 59 Conn. 228. A will executed by a testatrix

of feeble intellect in favor of the draughtsman, who was an attorney of dissipated habits, who had obtained complete control over her, leaving him the bulk of her property, was set aside in *Grove v. Spiker*, 73 Md. 300 (1889), 20 Atl. R. 144. And it also appeared in this case that he had induced the testatrix to permit him to reside in her house free of expense; that he had during her life succeeded in obtaining large sums of money from her as gifts and conveyances of land without consideration, and that she had executed another will, when she had the advice of her business manager, leaving her property to her relations. Where a son of the testator, who, for some time prior to his death, had exclusive control of his father's business affairs, was active in persuading the testator to make a will which favored him at the expense of his sister, for whom the testator had manifested a prior intention to provide equally with his other children, a condition of affairs has been proved from which a presumption of undue influence may reasonably be drawn. *Higginbotham v. Higginbotham*, 106 Ala. 314, 17 S. R. 516. The presumption against a will under which the draughtsman is the principal beneficiary is overcome by evidence that the provisions of the will were according to a scheme the testator had in mind for some

§ 146. Undue influence of a priest or other religious adviser.—As in other cases where a confidential relation exists between the testator and the principal legatee, the fact that the will disposes of the bulk of the property of the testator in favor of his religious adviser is not enough *alone* to raise a presumption that it was procured by undue influence.¹

But the presence of a priest at the bedside of the testator, the fact that the latter acted upon his suggestions and accepted his advice, and that the will is largely the result of these suggestions and advice, are always material. On the other hand, it is entirely consistent with freedom of will that the testator, though he have a family, shall give largely of his property to religious enterprises. Where the suggestions or advice of the priest result, not in a personal benefit to himself, but in securing a benefit to the particular church or form of religion of which he and the testator are adherents, no question of undue influence on the part of the priest arises; for whatever influence was exerted was not exerted for his own benefit.² If, upon the suggestion or importunity of his spiritual adviser, the testator leaves him a large share of his estate, to the exclusion of his immediate family, a suggestion of undue influence may arise; but even then it is only a suspicion, to be considered in connection with his relations with his family, his physical and mental weakness, and the extent to which he has been under the influence of the priest.

The principles which regulate this subject are identical with those in the case of a will made in favor of the attorney at law,

time; that the draughtsman had no hand in procuring the will; that the testator had talked over its provisions with his wife, had read the will, and, on being asked if there were any changes, said it was just as he wanted it. In *re Carver's Will*, 23 N. Y. S. 753, 3 Misc. R. 567. Where a very old woman at the point of death and unable to recognize acquaintances made a will in favor of her employer, for whom she had worked for twenty years, and who was of no kin to her, to the exclusion of a nephew with whom she was stopping, it was held

that a case was made out sufficient to submit the question of undue influence to the jury. In *re Moon's Will*, 8 N. Y. S. 86.

¹ *Figueira v. Taaffe*, 6 Dem. Sur. (N. Y.) 166; *Lyons v. Campbell*, 7 S. R. 250 (1889), 88 Ala. 462; *Hegney v. Head*, 126 Mo. (1894), 619, 627, 629, 29 S. W. Rep. 587; *Collins v. Brazill*, 63 Iowa (1884), 434, 435, 19 N. W. R. 398; *Carroll v. House*, 48 N. J. Eq. 269, 23 Atl. R. 191.

² *Kerrigan v. Leonard* (N. J.), 8 Atl. R. 503.

or physician, or other persons standing in a confidential relation to the testator, with the exception that, so far as priestly influence is concerned, it will often result in the procurement of testamentary gifts for the religious denomination to which the priest belongs. No wrong is committed, either from a moral or legal standpoint, by the spiritual attendant of the testator urging him to devise a portion of his estate to religious or charitable purposes. The mere fact that the priest is identified with the object of the charitable gift is not material. His conduct in attempting to advance the cause of his religion by securing funds for its support is to be commended as worthy of being followed by those other two professional persons who are usually in attendance at the bedside of the rich man, *i. e.*, the attorney who draws the will and the physician who endeavors to prolong his life. That the testamentary charity of opulent testators is so seldom exercised in favor of the endowment or support of professional schools for the training of attorneys and physicians is proof that the medical and legal advisers of the testator are negligent in pointing out to him on his death-bed opportunities for the *post-mortem* employment of his wealth in the advancement of their respective professions. That such action on their part would be proper and legal, if not highly commendable, cannot be doubted.

§ 147. **The influence of a wife is not undue.**— The fact that a man bequeathes his estate to his wife, excluding his children, his father or other relations, is absolutely immaterial upon the question of undue influence. The silent influence of affection and respect, augmented by the tender and kindly attentions of a faithful spouse, cannot be regarded as in any sense undue. Nor will the fact that the wife by solicitation, or even by urgent importunity, procures for herself all her husband's property, or a larger share than he devises to others, raise a presumption of law that the husband's will was procured by undue influence exerted by her, or that his mind did not act freely in preparing it.¹

¹ *Meeker v. Meeker*, 75 Ill. (1874), 26; Atl. R. 438; In re Buckle's Will, 2 Latham v. Udell, 88 Mich. 238, 241 N. Y. S. 24; In re McKenna's Will, (1878); *Pierce v. Pierce*, 88 Mich. 412; 4 N. Y. S. 458; In re Lyddy's Will, 4 Rankin v. Rankin, 61 Mo. 295, 300; N. Y. S. 468, 471, 5 id. 636; In re Stewart v. Stewart (N. J., 1898), 40 Thorne's Will, 7 N. Y. S. 198, 199; In

If a wife by her industry and virtue, and by the assistance which she has rendered her husband, has gained such an ascendancy over the mind of her husband; if she has by her faithfulness and good qualities secured his respect and esteem, so that her wish is a law to him, such influence, though it result in procuring a will in her favor to the total exclusion of all the relatives of the husband, would not amount to undue influence. Nor will the fact that the testator is a man of weak will power, who lived under the control of his wife, doing whatever she desired, and that in general she always possessed and exercised a powerful influence over his mind and conduct in every-day affairs, be enough to vitiate the will.¹

It will not be presumed, because a wife has ample opportunity to exert an influence which *may* be undue, that she has in fact done so.² Nor will any presumption of undue influence arise from the fact that the wife advised her husband in his business affairs and guided him through many difficulties, and at one time advised or requested him to make a will in her favor.³

§ 148. Evidence of the ante-nuptial relations of the parties.—Where a will is alleged to have been procured by the undue influence of the wife of the testator,⁴ it is permissible for the court to institute a thorough inquiry into the relations of the parties covering a period of reasonable length prior to

re Eiler's Will, 55 Hun, 607 (1889), 8 N. Y. S. 419, 420; In re De Baun, 9 N. Y. S. 807, 810; Hughes v. Mo-Murtha, 32 N. J. Eq. 288; Zimmermann v. Zimmermann (1854), 28 Pa. St. 375, 378; Moritz v. Brough, 16 S. & R. (Pa.) 403 (1827); Miller v. Miller, 3 S. & R. (Pa.) 267; Lide v. Lide, 2 Brev. (S. C.) Law, 98, 103; Stulz v. Schaeffle, 18 Eng. L. & Eq. 576; Mountain v. Bennett, 1 Cox, 355.

¹Potts v. House, 6 Ga. 324; In re De Baun, 9 N. Y. Supp. 807. The circumstance that a testator derived all his property from his wife, and that he did not need to labor for a livelihood because his wife supported him and the family, is material to

show a reason for his will made in her favor. In re Lyddy, *supra*.

²Peery v. Peery, 94 Tenn. 328, 339.

³Herwick v. Langford, 108 Cal. (1895), 608, 41 Pac. R. 701; Gwin v. Gwin (Idaho), 48 Pac. R. 295; Small v. Small, 4 Me. 220, 224 (1826); Hughes v. Murtha, 32 N. J. Eq. 288, 289; Collins v. Collins, 101 N. C. 114, 7 S. E. R. 687 (1888); Mason v. Williams, 53 Hun, 398, 6 N. Y. Supp. 479; Dean v. Negley, 41 Pa. St. 312 (1862); Nailing v. Nailing, 2 Sneed (34 Tenn.), 630, 635; Smith v. Harrison, 2 Heisk. (49 Tenn.) 230, 247, 250; Peery v. Peery, 94 Tenn. 328, 339; In re Jackman, 26 Wis. 104, 117. See cases cited in note 1, page 211.

⁴*Ante*, § 147.

the contracting of the marriage relation. The motives that prompted the marriage upon the part of the proponent, the sickness and helpless condition of the testator at the time, the fact that the testator was an elderly man while the proponent was very much younger,¹ the efforts of the proponent and of her parents and relatives to bring about the marriage, the poverty of the wife and the wealth of the testator, may all be considered on the issue of undue influence.²

Evidence of illicit relations existing between the parties before their intermarriage, particularly if either of the parties were married at the time, is always relevant, though never controlling or conclusive of undue influence.³ But evidence of the illicit relations of the parties before marriage must not be too remote, or it will be rejected.⁴ Evidence of the kind relations which existed between the testator and his wife is always relevant to rebut the presumption of undue influence;⁵ while to sustain an allegation of undue influence exerted by a wife it may be proved that the testator had said that he regretted his marriage, as he was not master of his own home, and had admitted that he was afraid of his wife and was compelled to submit to her demands or there would be trouble in the house.⁶

§ 149. Adulterous relations existing between the testator and a beneficiary as bearing upon undue influence.—The cases are not harmonious upon the question whether the influence exerted upon the testator by a woman with whom he has maintained illicit sexual relations which results in procur-

¹Baldwin v. Robinson, 93 Mich. 438.

²Primmer v. Primmer, 75 Iowa, 415 (1888), 39 S. W. R. 676; Reichenbach v. Ruddach, 18 Atl. R. 432, 127 Pa. St. 546 (1889), 24 W. N. C. 476. Cf. *contra*, Maynard v. Tyler (Mass.), 46 N. E. R. 413.

³Maynard v. Tyler (Mass.), 46 N. E. R. 413; Potter's Appeal, 53 Mich. (1884), 106.

⁴Batchelder v. Batchelder, 139 Mass. 1, 29 N. E. R. 61; Pierce v. Pierce, 38 Mich. (1878), 412; Flint's Estate, 100 Cal. 391, 34 Pac. R. 863. Where the testator had been married twice, and it was alleged that his

will had been procured by the undue influence of his second wife, it was permitted to show that she, who was much younger than the testator, had had a child by him during the life of his first wife, that he had married her within two months of the death of the former wife, and that immediately thereafter he became estranged from his children, with whom he had always been on the best of terms. Baldwin v. Robinson, 93 Mich. 438, 53 N. W. R. 531.

⁵Collins v. Collins, 101 N. C. 114, 118, 7 S. E. R. 687.

⁶Beaubien v. Cicotte, 12 Mich. 450.

ing a will in her favor is of necessity undue influence which will avoid the will. We have seen that the influence of a wife by which, either by means of persuasion or solicitations, she procures a benefit for herself in the will, is not undue if the mind of the testator is not coerced at the moment of the execution of the will. And the courts have gone very far in sustaining testamentary provisions for a wife upon the grounds that kindness, gratitude and respect were the motives that prompted them, and that, where such motives exist, no question of undue influence can legitimately arise.

Some of the cases draw a distinction between the influence of lawful and unlawful relations. They hold that an influence which, if *exercised by a wife* to procure a benefit for herself, would not be undue, because of the legitimacy of the relations existing between her and the testator, would constitute undue influence if *exercised by a woman who occupied adulterous relations towards him*.¹

§ 150. No presumption of undue influence in devise to mistress of the testator.—But the majority of the decisions do not recognize any presumption of undue influence from proof that a beneficiary was unlawfully cohabiting with the testator, or from the fact that illicit sexual intercourse was or had been maintained between them. The relations of the parties, whether lawful or the reverse, are always relevant on the question of undue influence, and may be shown. But it is always a question of fact whether undue influence was exerted, to be determined according to all the circumstances, and not merely according to the nature of the relations of the parties. The court may consider the immoral and illegal relations of the parties as one element, and may scrutinize their relations and actions very closely, particularly in a case where a testator

¹“We should do violence to the morality of the law, and therefore to the law itself, if we should apply this rule to unlawful as well as to lawful relations; for we should thereby make them both equal in this regard, which is contrary to their very nature.” *Dean v. Negley*, 41 Pa. St. 312, 317. “We are of opinion that there is a difference in the two cases, and that an influence

which exercised by a wife may be lawful and legitimate, but which, if exercised by a woman occupying merely an adulterous relation to the testator, might be undue and illegitimate. This must be so from the very nature of civilized human society and the domestic relations of life.” *Kessinger v. Kessinger*, 37 Ind. 341, 343.

disposes of his property in favor of one with whom he had maintained illicit relations, to the exclusion of a lawful wife or of his legitimate children.¹

Thus, a man may devise all his estate to his mistress, to the *total exclusion of his lawful wife*, from whom he is separated, if he has testamentary capacity, and the will is the outcome of his free and uninfluenced volition.²

§ 151. Wills procured by fraud — Fraud defined and classified.— Fraud employed in procuring a will, no less than coercion, may justify it being set aside. Both are equivalent to undue influence, and both are usually present in the same transaction. Fraud in the procurement of a will manifests its presence in an infinite variety of ways; and courts of equity, having frequent occasion to deal with fraud, and to set aside transactions tainted with it, hesitate to define it precisely, lest those addicted to it may discover a way to circumvent the rules formulated to prevent it. The division of fraud into actual and constructive is of little value. We may assume that *the act*

¹ In *re Ruffino* (Cal., 1898), 48 Pac. R. 127; *Roe v. Taylor*, 45 Ill. (1867), 485; *Denoth v. Franklin*, 9 B. Mon. (48 Ky., 1848), 28; *Sunderland v. Hood*, 84 Mo. 293, 297; *Monroe v. Barclay*, 17 Ohio St. 302, 316-318; *Main v. Ryder*, 84 Pa. St. 217, 225; *Rudy v. Ulrich*, 69 Pa. St. 177, 181; *Heilbrun's Estate*, 9 Pa. Co. Ct. R. 350; *Dean v. Negley*, 41 Pa. St. (1861), 312, 318; *Hummel's Estate*, 7 Kulp (Pa.), 339; *Nussear v. Arnold*, 13 S. & R. (Pa., 1825), 323; *Wainright's Appeal*, 89 Pa. St. (1879), 220, 225; *Johnson's Appeal*, 159 Pa. St. 630, 28 Atl. R. 630; *McClure v. McClure*, 2 Pickle (36 Tenn.), 173, 6 S. W. R. 44; *Bryant v. Pierce*, 70 N. W. R. (1896), 297, 95 Wis. 331, 340.

² *Arnault v. Arnault*, 52 N. J. Eq. (1894), 801, 805. See also *Mondorf's Will*, 110 N. Y. (1888), 450, 456, 18 N. E. R. 256, in which case the testator, who had been living apart from his wife for many years, had been cared for during that time by the beneficiary, with whom there was only

slight evidence he had maintained illicit relations. In *Arnault v. Arnault*, 52 N. J. Eq. 801, on p. 805, the court says: "Nor does the influence which arises from unlawful or immoral relations raise a presumption against the validity of the will; but, as the law abhors immorality, when the influence which produces a will arises from an immoral relation its existence, standing as a significant fact, will be closely and suspiciously scrutinized by the courts. Particularly is the necessity for such scrutiny emphasized when the will prefers the influence of a mistress, usually predicated upon sensual charms and meretricious arts, to the just and honorable influence of a lawful wife, attributable to purity, virtue and affection. However, the law allows a man to leave all the property he may dispose of by will to his mistress, and to ignore his wife, if he does so with free, sound and disposing mind."

of substituting a will, not containing the true intention of the testator, for one he is about to sign, would be a case of *actual fraud*. Such cases are very rare. But fraud in the shape of wilful falsehood and misrepresentation, and concealment of the truth from the mind of the testator, with the object of influencing his testamentary intention, is of most frequent occurrence.

Whether a will shall be set aside as procured by fraud always depends upon the circumstances of the case. Some men are extremely credulous, and may be readily imposed upon. Some men are open to believe evil reports of their fellows, while others, because less cynical, more frank and trusting, or better intentioned themselves, are slow to believe slanderous accusations. Whether the will is the result of fraud is a question for the court or jury upon all the evidence, taking into consideration the physical and mental condition of the testator at the time of execution. Fraud will never be presumed without some evidence. But where it is shown that a will has been procured by false representations knowingly made, and with an intention to be relied upon, and the will is the result of the falsehoods thus practiced, it should be set aside.

Where the contestant asserts that a beneficiary, for the purpose of influencing the mind of the testator against him, fabricated reports and made charges of evil conduct by him, evidence to show the truth of the charges made should be received.¹

¹ *Torrey v. Burney* (Ala., 1898), 21 S. Rep. 348. A will made by a married woman in which she devises all her property to her husband, to whom she had been married only a short time, may be set aside as having been procured by fraud, where it appeared that he had a wife living during the time he lived with the testatrix as her husband. *In re Rockwell's Will*, 50 Hun, 601, 2 N. Y. Supp. 378. If a will was obtained by fraud it is void, and no subsequent ratification would be good without a formal re-execution or republication. *Haines v. Hayden*, 95 Mich. 332, 54 N. W. R. 911. "If the testator be compelled by violence, or urged by threatenings, to make the testament, that testament,

being made by just fear, is ineffectual. Likewise, if he be circumvented by fraud, the testament loseth its force. For albeit, honest and modest intercession and request are not prohibited, yet these fraudulent and malicious means, whereby men are secretly induced to make their testaments, are no less detestable than open force." 1 Swinb. 22. "Fraud is a distinct head of objection from importunity and undue influence. Importunity and undue influence may be fraudulently exerted, but they are not inseparably connected with fraud. Nor is it every degree of importunity that is sufficient to invalidate a will or testament. Honest and modest intercession or per-

Where the procurement of the will by fraud is alleged, the evidence should be permitted to take a very wide range. Fraud can usually be proved only by showing the circumstances of the parties who have been benefited and defrauded, and a comprehensive view of all these circumstances, the sayings and doings of both parties, and their relations, not only at the precise moment when the will was executed, but during a reasonable period before and after, is essential. All facts are relevant that show that the will was procured by fraud, or that it was not thus procured, their remoteness, within reasonable limitations, being no objection to their competency, but to their weight alone.¹

§ 152. Evidence of false and misleading statements by the beneficiary.—False statements made by a beneficiary to the testator in regard to the character or conduct of another person who has a claim upon his bounty are material upon the question of fraud or undue influence. The mere fact that the testator entertains an unreasonable prejudice or a mistaken belief as to the feelings or actions of a person to whom he is related, but who receives nothing under the will, is, in itself, no indication that he was prevented from providing for him by reason of any fraud or coercion exercised upon him. This is the case even when the belief is wholly without any foundation in fact, if it is honestly entertained, and if it is not shown to have been the result of the misrepresentations of others who benefit thereby.²

But a dislike towards one who, from his situation as regards the testator, may have claims upon his bounty, created or fos-

suasion, or flattery unaccompanied by fraud or deceit, and where the testator has not been threatened, or put in fear by the flatterer or persuader, or his power or dominion over him, will not have that effect. But there may be great and overruling importunity and undue influence without fraud, which, when established, may and ought to have effect (under circumstances) to avoid a will or testament. Such are the immoderate, persevering and begging importunities of a wife who will take no denial, pressed upon an old and feeble man, which may be better imagined than described." *Davis v. Calvert*, 5 Gill & J. (Md.) 269, on p. 303.

¹ *Chandler v. Jost*, 96 Ala. 596, 603

² *Weathers v. McFarland* (Ga.), 22 S. E. R. 988; *Stewart v. Jordan*, 50 N. J. Eq. 733, 26 Atl. R. 706; *In re Mitchell's Estate* (1890), 43 Minn. 73, 44 N. W. R. 885; *Elkinton v. Brick*, 44 N. J. Eq. 154 (1888), 15 Atl. R. 391; *In re Cahill's Estate* (Pa. St., 1898), 36 Atl. R. 563.

tered by the false representations of a beneficiary under the will, stands upon another basis. A will procured by lying is no less invalid than a will procured by violence. And if the will was procured wholly by means of false representations made by a beneficiary, he knowing them to be untrue, and if it appears that he made the false statements with the intention that they should be acted upon by the testator, and that they should influence him to make a testamentary disposition of his property in his favor, and that the false statements did in fact produce the will, a clear case of the fraudulent procurement of a will is made out, and the will ought to be set aside as procured by undue influence.¹

§ 153. **Trusts arising ex maleficio.**—Under the head of the fraudulent procurement of wills may be ranged cases where the testator, relying upon the parol promise of a beneficiary that he will dispose of a devise for the benefit of a third person, makes a will in his favor, or, for the same reason, refrains from revoking one, and the beneficiary refuses or neglects to carry out the wishes of the testator. A court of equity will enforce the parol promise and decree specific performance. So where the heir promises his ancestor that, if he will refrain from making or will revoke a will, he will dispose of the property which he will inherit according to his wishes, the same rule will be applied. The heir will be treated as a trustee for the expectant devisee.²

¹Smith v. Du Bose, 78 Ga. 413 (1887), 3 S. E. R. 309; In re Budlong's Will, 126 N. Y. 423, 27 N. E. R. 945, affirming 7 N. Y. Supp. 289; Hiss v. Weik, 78 Md. 439 (1894), 28 Atl. R. 400. Where it appeared that, prior to the execution of the will, the testator, who was the father of the contestant, acted affectionately to her, and had declared that he did not intend to make a will; but that about this time the contestant's sister, the proponent of the will, told her she was an illegitimate child, that testator, about the time of the execution of the will, visited the proponent, frequently returning home morose and irritable, treated the con-

testant with great coolness, and told others that she was not his daughter, which accusation was often repeated to the testator by the proponent, and that she had many private conversations with the testator, a complete case of undue influence exerted by means of false representations is made out, and a will procured thereby ought to be set aside. Haines v. Hayden, 95 Mich. 32, 54 N. W. R. 911.

²Thus, where an heir advised a testator to have a fine levied on land entailed and which was devised, concealing from him the fact that this would revoke the will *pro tanto*, it was held that the heir for his fraud

And if the testator has indicated some definite and certain beneficiaries, equity will act and decree a specific performance in their favor, not upon the ground that any express trust has been created, but because no man can be permitted to profit by his fraud, or to acquire a benefit as a result of his breach of duty and at the expense of others. The statutes of frauds and of wills are not applicable, for the devise is not wholly set aside. The legal title passes to the devisee or heir, but not absolutely, for equity will raise a trust *ex maleficio* instead of relying upon that which the testator has attempted to create. The fraud consists in the attempt to procure all the advantages of the compact made with the deceased, while attempting to avoid its obligations and responsibilities. So where a father, intending to charge lands devised by him with an annuity in favor of his son, was dissuaded from doing so by the promise of the devisee that he would pay the annuity, the devisee was declared a trustee for the annuitant.¹ And where a testator, desiring to alter his will, was told by the executor that he need not do so, but that he would pay the legacy intended to be made, the court decreed it to be paid by the executor.² The same result follows where the testator leaves all his property to his wife, or some other person, upon the promise, express or implied, that she will support their children, or that he will pay a legacy, or will distribute the proceeds among a class of persons.³

held the land thus acquired as a trustee for the devisee named in the will. *Bulkley v. Wilford* (1834), 2 Cl. & Fin. 177, 8 Bligh, 111.

¹ *Rookwood's Case*, Cro. Eliz. (1590), 164; *Oldham v. Litchford*, 2 Vern. 506.

² *Reech v. Kennegale* (1748), 1 Wils. 227, 1 Ves. Sr. 124, Amb. 67; *Devenish v. Baines* (1689), Finch, Prec. Ch. 3; *Gaullaher v. Gaullaher*, 5 Watts (Pa.), 200; *Barrow v. Greenough*, 8 Ves. (1796), 152.

³ *Dowd v. Tucker*, 41 Conn. 197; *De Laurencel v. De Boon*, 48 Cal. 581; *Gilpatrick v. Glidden*, 81 Me. 137, 151-157; *Curdy v. Burton*, 79 Cal. 420, 21 Pac. R. 838; *Browne v. Browne*, 1 Harr. & J. (Md., 1803), 430; *Owings*

v. Owings, 1 Bland Ch. (Md.) 370, 403, 17 Am. Dec. 311, 317, 318; *Glass v. Hulbert*, 102 Mass. 24, 39, 40; *Campbell v. Brown*, 129 Mass. 23, 26; *Oliffe v. Wells*, 130 Mass. 221, 224; *Hooker v. Alford*, 33 Mich. 454; *Williams v. Vreeland*, 32 N. J. Eq. (1880), 135, 137, 734; *Amherst Col. v. Ritch*, 91 Hun, 509, 45 N. E. R. 876 (N. Y., 1898); *Graves v. Graves*, 9 N. Y. Supp. 145; *Williams v. Fitch*, 18 N. Y. (1859), 546, 550; *In re O'Hara*, 95 N. Y. 403; *Brown v. Lynch*, 1 Paige Ch. (N. Y.) 147; *Hoge v. Hoge*, 1 Watts (Pa.), 163, 215, 216; *Jones v. McKee*, 3 Pa. St. (1846), 406, 6 Pa. St. 425; *Church v. Ruland*, 64 Pa. St. 432; *Williams' Appeal*, 13 Pa. St. (1850), 249; *McLellan v. McLean*, 2 Head (39 Tenn.),

§ 154. **Actions on the part of the beneficiary which suffice to constitute him a trustee ex maleficio.**— Even though the person who has received the benefit has encouraged the testator to make, or to refrain from making, a will, solely by his silence and outward acquiescence in the declared expectation of the testator, the rule is the same; for his silence will, under the circumstances, have the effect of an express promise. It is a general rule that a promise may be inferred from conduct and circumstances. And if the person has knowledge of a possible gift by will in his favor, and of the expectation of the testator as to his disposition of it, he should speak and say whether he means to act in accordance with the expectation which induces and underlies the devise to him, for otherwise his silence will be equivalent to fraud.¹

If a devisee had no part in the procurement of the will, and, *a fortiori*, if he knew nothing of it until after the testator's death, no trust will be recognized, though it shall conclusively appear that the testator intended, while giving him the legal title absolutely, that he should act as a trustee,² though the secret trustee, as soon as the will came to his knowledge, expressed his intention of complying with the wishes of the deceased.

684; *Brook v. Chappell*, 34 Wis. 405; *Bedilian v. Seaton*, 3 Wall. Jr. (1860), 279; *Chester v. Urwick*, 23 Beav. 487; *Bulkeley v. Wilford*, 2 Cl. & Fin. 177, 8 Bligh, 111; *Sellac v. Harris*, 2 Eq. Cas. Abr. 46; *Chamberlain v. Chamberlain* (1678), 2 Eq. Cas. Ab. 43; *Oldham v. Litchford*, 2 Freem. 284, 2 Vern. 506; *Riordan v. Barron*, 10 Ir. Eq. R. 645; *Rowbotham v. Dunnett*, L. R. 8 Ch. Div. 430; *Fleetwood's Case*, L. R. 15 Ch. Div. 594, 606; *Boyes' Case*, 26 Ch. Div. 531, 535; *Jones v. Badley*, L. R. (1867), 3 Eq. 635, 652, 3 Ch. App. 362, 364; *Norris v. Frazer*, L. R. 15 Eq. 318, 330; *McCormick v. Grogan*, L. R. 4 H. L. 82, 88; *Podmore v. Gunning*, 5 Sim. 485, 7 Sim. 644; *Barrow v. Greenough*, 3 Ves. 152; *Kingsman v. Kingsman*, 2 Vern. 559; *Thynn v. Thynn*, 1 Vern. 296; *Strickland v. Aldridge*, 9 Ves. 519; *Nab v. Nab*, 10 Mod.

404; *Strode v. Winchester*, 1 Dick. 397; *Marriot v. Marriot*, 1 Stra. 672. ¹ *In re O'Hara*, 95 N. Y. (1884), 403, 413; *Appeal of Schultz*, 80 Pa. St. (1875), 396, 405; *Walgrave v. Tebbs*, 2 Kay & J. 313, 321; *Russell v. Jackson*, 10 Hare, 204; *Brynn v. Godfrey*, 4 Ves. 6, 10; *Paine v. Hall*, 18 Ves. 475; *Strickland v. Aldridge*, 9 Ves. 519; *Gilpatrick v. Glidden*, 81 Me. 137, 151.

² *Adlington v. Cann*, 3 Atk. 141, 151; *In re Boyes*, L. R. 26 Ch. D. 531. As by a subsequent declaration of trust executed in writing but never communicated to the trustee.

³ *Schultz' Appeal*, 80 Pa. St. 396, 405; *Rowbotham v. Dunnett*, L. R. 8 Ch. D. 430, 437; *Wallgrave v. Tebbs*, 2 K. & J. 313, 322, 328; *Williams v. Vreeland*, 32 N. J. Eq. 734, 737. Where the testatrix gave to her executors ab-

§ 155. Acts and statements of one of several as binding others in a secret trust.—Where the gift in a secret trust is to several *jointly*, and it appears that it was made upon the promise and assent of one of them only, the others cannot take beneficially, for it is not material whether all knew of it or promised to perform the trust; for all, where a devise is joint, acquire their title through the act of one, and must take it burdened with his obligation.¹ But the rule is otherwise where the devise is to several as *tenants in common or in severalty*,² for then none of them is bound by the language, acts or silence of the others.³

§ 156. The admissibility of parol evidence to prove the fraud.—Where the making of a promise to disburse the property by a devisee is to be proved, it may be done by the introduction of parol evidence.⁴

solutely all legacies which may fail for any reason, "in the use of which" she was "satisfied they would follow what they believed to be her wishes, but imposing upon them no conditions, leaving the same to *them absolutely and personally*, without limitations or restrictions," the court held that the executors took as individuals all property not validly disposed of. *Fairchild v. Edson*, 154 N. Y. 199, 48 N. E. R. 541. In *Barrows v. Greenough*, 3 Ves. 152, where a testator told a residuary legatee that "he would leave it to his generosity" to pay an annuity, the court determined that an intention to leave the payment to the generosity of the legatee would not relieve the latter from an obligation to keep his promise to pay, made to the testator. The testator meant to leave it to the honor and conscience of the legatee, and, though the legatee may have had no intention to defraud at the time of his promise, if the deceased was prevented thereby from altering his will or making a new one, the legatee must pay the annuity. So where one of several executors to whom a bequest was made, on a secret trust, of all legacies which might lapse be-

cause of statutory inhibition, was the legal adviser of the testatrix, and shortly before her death attended to the execution of the clause containing this disposition, and shortly after the death of the testatrix the executors joined in a deed of gift to the disappointed legatees which was invalid, the executor who attended the execution of the deed was a trustee for the next of kin. *Fairchild v. Edson*, 154 N. Y. 199, 48 N. E. R. 54.

¹ *In re O'Hara*, 95 N. Y. 403, 413; *Rowbotham v. Dunnett*, L. R. 8 Ch. D. (1878), 430, 437.

² *Tee v. Ferris*, 2 Kay & J. 357.

³ One of several executors had assumed a secret trust to dispose of legacies given to the executors absolutely to dispose of them for the benefit of corporations which by statute were inhibited from taking. Held, that the others who knew nothing of the secret trust should take absolutely and not as constructive trustees for the next of kin. *Fairchild v. Edson*, 154 N. Y. 199 (1897), 48 N. E. R. 541. And *cf.* *Trustees of Amherst College v. Ritch*, 91 Hun, 509, 45 N. E. R. 878.

⁴ *Owing's Case*, 1 Bland Ch. (Md., 1803), 370; *Collins v. Hope*, 20 Ohio

Parol evidence in such a case is not received to revoke or vary the will, but to give to it the true effect intended by the testator. The evidence is not introduced to engraft a parol trust upon the written language of the will, nor to contradict the intention of the testator, but to show that the language of the will as written does not express his intention. The trust depends for its validity, not upon the will, but upon the fraud of the beneficiary, and it is to prevent his fraud that parol evidence is received to show that he is appropriating property to a purpose different from that for which he consented to hold it.¹

The temptation and opportunity for the employment of perjury in this class of cases are so obvious that a court of equity will regard them with great caution, scrutinizing the evidence with care, and invariably requiring the applicant, on whom is cast the burden of proof, to show all necessary facts by clear and satisfactory evidence.²

§ 157. The resulting trust for heirs when implied secret trust is void.—If the trust which is raised *ex maleficio* is for the benefit of persons or corporations incapable of taking, or if by enforcing the trust some rule of law, statutory or otherwise, is to be violated, as would be the case if the duration of

(1851), 493, and cases cited in note 3, p. 219. It is doubtful if the declarations of the testator alone are receivable to prove the trust. *Weston v. Foster*, 7 Met. (Mass.) 297. In *Sims v. Sims* (Va.), 27 S. E. R. 436, the court held that parol evidence was inadmissible to prove oral directions which had been given to a legatee who took his legacy under a secret trust. See also *Moran v. Moran* (Iowa), 73 N. W. R. 617. The remarks of Lord Eldon in *Strickland v. Aldridge*, 9 Ves. 516, on page 519, on this point, are frequently cited with approval. "If an estate is suffered to descend, the owner being informed by the heir that, if the estate is permitted to descend, he will make a provision for the mother, wife or any other person, there is no doubt equity would compel the heir to discover whether he did make such provision.

So, if a father devises to the youngest son, who promises that if the estate is devised to him he will pay £10,000 to the eldest son, equity would compel the former to discover what passed in parol; and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of £10,000." In all such cases of fraud the statute is no bar. The court will not suffer the statute to be used to promote fraud. *Reech v. Kennegale*, 1 Ves. (1788), 123, Amb. 67, 1 Wils. 227; *Drakeford v. Wilks* (1747), 3 Atk. 509; *Cagney v. O'Brien*, 83 Ill. 72.

¹ *Williams v. Vreeland*, 32 N. J. Eq. (1880), 734, 737; *Church v. Ruland*, 64 Pa. St. (1870), 432.

² *Williams v. Vreeland*, 32 N. J. Eq. 734, 737; *Collins v. Hope*, 20 Ohio, 492; *Appeal of Schultz*, 80 Pa. St. 396, 405; *Graves v. Graves*, 9 N. Y. S. 145.

the trust is for a longer period than is sanctioned by the rule against perpetuities, the whole scheme is invalid. Then, though the trustee *ex maleficio* is willing to perform, he will not be allowed to do so. He cannot be permitted to violate the law or evade the statute, and do for the testator what the latter could not legally do for himself by his will. To permit this under pretense of an honorable obligation is not only hypocrisy in the abstract, but the perpetration of a fraud upon the heir and the next of kin.¹

If, therefore, the purpose of the trust is an illegal one, or if the object of its creation by the testator was to accomplish a disposition of his property which would have been illegal and void if made directly in his will, the court will decree that the trust, instead of being raised for the persons secretly indicated, will result to the heirs or next of kin, or that the property shall pass under the residuary clause, according to the circumstances.²

§ 158. No trust arises where promise is without consideration.—A promise made to the testator by one who takes no benefit under the will, to the effect that he will give something to a third person, by which the testator is induced to omit the name of such person from his will, or to revoke or reduce a legacy given him, raises no trust in his favor as against the promisor. The agreement is *nudum pactum* and not enforceable as without consideration.³

§ 159. Will may be admitted to probate as to that part not procured by undue influence.—If the whole will is the result of the presence of undue influence, probate of the whole will must be refused. If only a part of it was affected by undue influence, that part may be rejected as void, but the remainder, which is the outcome of the free action of the testator, ought

¹In *re O'Hara*, 95 N. Y. 403, 421; (1804); *Paine v. Hall*, 18 Ves. 475; *Fairchild v. Edson*, 154 N. Y. 199, 48 (1812); *Carrie v. Cumming*, 26 Ga. N. E. R. 541; *Jones v. Badley*, L. R. 3 690 (1859).

Eq. 625; *Russell v. Jackson*, 10 Hare, 196, 204 (1852); *Wallgrave v. Tebbs*, 2 K. & J. 313, 321 (1855); *Muckleston v. Brown*, 6 Ves. 51, 63, 65; *Lomax v. Ripley*, 3 Smale & G. 48; *Carter v. Green*, 3 K. & J. 561; *Moss v. Cooper*, 1 J. & H. 352; *Springett v. Jennings*, L. R. 10 *Eq.* 488, L. R. 6 *Ch. App.* 338; *Strickland v. Aldridge*, 9 Ves. 515.

²This rule has been applied to gifts of property for charitable purposes which were void under the statute of mortmain. See cases cited in last note.

³*Mercier v. Mercier* (1874), 50 Ga. 546; *Robinson v. Denson*, 3 Head (Tenn., 1859), 395, 397.

to be sustained (if it can be separated from the part which is invalid), and should be admitted to probate.¹

§ 160. Equitable jurisdiction in case of the homicide of the testator by a beneficiary.—The peculiar case in which a testator is murdered by one of the beneficiaries under his will has received recent attention from the courts. Instances of this kind are rare. But such cases have occurred, and the rulings of the courts are harmonious upon the law applicable thereto. Theoretically the will is not invalidated in any respect. The executor may qualify and act as such; and any beneficiary, not implicated in the homicide, is entitled to enjoy what may have been conferred upon him by the will.

As regards the criminal whose hand has procured the death of his benefactor, a different principle is invoked in order to remedy the gross and manifest injustice of permitting *him* to profit by the perpetration of crime. Upon the application of the next of kin, or the heirs of the testator, a court of equity will interpose to deprive the devisee of the fruits of his iniquity. He will be regarded as a trustee *ex maleficio* to the extent of the property given him, and will be held to a rigid responsibility to account for it to those to whom it of right belongs.²

¹ *Florey v. Florey*, 24 Ala. 241; *Eastis v. Montgomery*, 93 Ala. 293, 9 S. R. 311; *Harrison's Appeal*, 48 Conn. 202; *Wills v. Tanner* (Ky.), 18 S. W. R. 166; *Lyons v. Campbell*, 88 Ala. 462, 7 S. R. 250; *Ogden v. Greenleaf*, 143 Mass. 349 (1887), 9 N. E. R. 745; *In re Welsh*, 1 Redf. (N. Y.) 238; *Smith v. Fenner*, 1 Gall. C. C. (1812), 170; *Steadman v. Steadman* (Pa., 1888), 14 Atl. R. 406; *Trimleston v. D'Alton*, 1 Dow & C. 85; *Guillamore v. O'Grady*, 2 Jones & L. 210; *Haddock v. Trotman*, 1 Fost. & F. 81; *Allen v. McPherson*, 1 H. L. Cas. 191.

² *Ellerson v. Westcott*, 148 N. Y. 149 (1895), 42 N. E. R. 540, reversing 34 N. Y. S. 813; *Lundy v. Lundy*, 24 Canada S. C. R. 650; *Riggs v. Palmer*, 115 N. Y. 506, 512, 513, 22 N. E. R. 188. It is not material, in an action to have a will set aside upon the ground that the beneficiary pro-

cured the death of the testator, that he has not been criminally charged with or tried for his crime. *Ellerson v. Westcott*, 34 N. Y. Supp. 813, 80 Hun, 389 (1894), 2 N. Y. An. Cases, 118. In this case Earl, J., said: "The purpose of these statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them, this purpose must be kept in view. It was the intention of the lawmakers that the donees in the will should have the property given to them. But it could never have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. . . . What could be more unreasonable than to suppose that it was the legislative inten-

§ 161. **The declarations of the testator to show or to rebut undue influence or fraud.**—The exercise of undue influence must be proved by some direct evidence of *acts* showing such influence or of circumstances from which its existence may be inferred. There must be some evidence other than the declarations of the testator, for it is settled that his declarations are not admissible as direct evidence of undue influence, or to show that the will was procured thereby. Thus, for example, it cannot be proved as *direct evidence of coercion* that the testator, after he executed his will, stated that it had been procured by fraud, force or coercion, that the instrument was not his will, voluntarily framed, or that in some particular respect it did not contain his intention. Such statements, not being under oath, are hearsay and inadmissible. And in the case of a will, for a court to receive such statements would be tantamount to permitting it to be revoked by parol, contrary to the provisions of the statute.¹

tion, in the general laws passed for the orderly, peaceable and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws. . . . No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. . . . He murdered the testator expressly to vest himself with an estate. Under the circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He

caused that death, and thus, by his crime, made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him. . . . Can he give effect and operation to a will by murder, and yet take the property?" Citing *Domat*, pt. 2, book 1, tit. 1, § 3; *Code Napoleon*, § 724; *Mackeldy's Rom. Law*, 530, 550.

¹*Gwin v. Gwin* (Idaho, 1898), 48 *Pac. R.* 295; *Runkle v. Gates*, 11 *Ind.* (1858), 35; *Mooney v. Olsen*, 22 *Kan.* 69, 76; *Todd v. Fenton*, 66 *Ind.* (1879), 25; *May v. Bradlee*, 127 *Mass.* 414; *Harring v. Allen*, 25 *Mich.* 505; *In re Storer*, 28 *Minn.* 9; *Garland v. Smith*, 127 *Mass.* (1879), 527; *Bush v. Bush*, 87 *Mo.* 480; *Gibson v. Gibson*, 87 *Mo.* (1885), 227; *Doherty v. Gilmore* (*Mo.*, 1898), 37 *S. W. R.* 1127; *Whitman v. Morey*, 63 *N. H.* 448; *In re Pemberton*, 40 *N. J. Eq.* 520; *Middle-ditch v. Williams*, 45 *N. J. Eq.* 726, 17 *Atl. R.* 326; *Cudney v. Cudney*, 68 *N.*

But the condition of the mind of the testator is always relevant on the question of undue influence. His hopes and fears, his likes and dislikes, his feelings of affection to one person or to a class of persons interested in the will, or his hatred and antipathy towards others, may always be shown.¹ His mental condition may explain testamentary dispositions which otherwise would be inexplicable. And, generally, how a man feels towards others can only be ascertained by what he says to or about them.

In cases of undue influence it is of the utmost importance to ascertain whether the mind of the testator was free from constraint at the time of the execution of the will, whether his mind was then permitted to work out his intentions, or whether his mental operations were directed and dominated by the stronger will of the person who is alleged to have exerted the undue influence. What a man says to those about him is a reliable test of the strength or weakness of his mental condition. If the utterances are so far connected with and related to the act of execution as to form a part of the *res gestæ*, they are received on that ground alone.²

But the declarations and the conduct of the testator, *not only at the time of the execution, but before and after it, are received if occurring within a reasonable time of it*, as tending to show his mental condition, *i. e.*, his memory, intention and affections at that time. Thus, his previous statements showing an intention to make a will consistent with the provisions of the will offered for probate, and his statements showing his affection for the beneficiaries under it, may be received to rebut any presumption of its procurement by undue influence.³

Y. (1877), 148; *Jackson v. Kniffen*, 2 Johns. (N. Y., 1806), 31; *Herster v. Herster*, 122 Pa. St. 239, 16 Atl. R. 342; *Lewis v. Lewis*, 2 W. & S. (Pa.) 465; *Kaufman v. Caughman* (S. C., 1898), 27 S. E. R. 16; *Means v. Means*, 5 Strobb. Eq. (S. C.) 167; *Robinson v. Hutchinson*, 26 Vt. 38; *Richardson v. Richardson*, 35 Vt. (1862), 238; *Chadwick v. Haley*, 81 Tex. (1891), 617; *Stevens v. Van Cleve*, 4 Wash. C. C. 265. The answer of the testatrix in a suit based on a contract in which she, prior to the execution of the will, stated that she was weak, unable to read and write or to transact business, was received to show weakness of mental condition. *Manatt v. Scott* (Iowa, 1898), 76 N. W. R. 717.

¹ See § 182.

² *Shailer v. Bumstead*, 99 Mass. 112.

³ *Coghill v. Kennedy* (Ala., 1898), 24 S. R. 459; *Harp v. Parr*, 168 Ill. 459, 471, 48 N. E. R. 113; *Mallery v. Young*, 94 Ga. 104, 22 S. E. R. 142; *Jones v. Roberts*, 37 Mo. App. 163; *Dye v.*

The declarations of the testator which are subsequent to the execution of the will, made when he is shown to have been under no influence, expressive of satisfaction with it, or the reverse, may be received for the purpose of showing the existence or non-existence of undue influence at its execution.¹

Young, 55 Iowa, 483, 435; In re Goldthorpe, 94 Iowa, 386, 62 N. W. R. 845; Thompson v. Ish, 99 Mo. 160, 12 S. W. R. 510; Kaufman v. Caughman (S. C., 1898), 27 S. E. R. 16; Trost v. Dingles, 118 Pa. St. 259, 12 Atl. R. 142; Beaubien v. Cicotte, 12 Mich. 459, 487; Herster v. Herster, 122 Pa. St. 239, 16 Atl. R. 342; Gardner v. Frieze, 16 R. I. 640, 19 Atl. R. 113; Quick v. Quick, 3 Sw. & Tr. 442. The statement of the testator that he intended to give his property to the proponent (Maxwell v. Hill, 89 Tenn. 584, 15 S. W. R. 253); that he regarded himself as under great obligations to him, and that he ought to receive the greater part of the estate (Hindman v. Van Dyke, 153 Pa. St. 243, 25 Atl. R. 772), have been received. The testator's declarations of his views on the subject of making wills, and his opinions that children should share alike, are admissible only when they refer to his own testamentary plans. Staser v. Hogan, 120 Ind. 207, 21 N. E. R. 911.

¹ Coghill v. Kennedy (Ala., 1898), 24 S. R. 459; Campbell v. Carnahan (Ark., 1895), 13 S. W. R. 1098; Calkins v. Calkins (Cal., 1898), 44 Pac. R. 577; Grant v. Thompson, 4 Conn. 203 (1823); Jones v. Grogan (Ga., 1896), 25 S. E. R. 590; Ball v. Kane (Del., 1897), 39 Atl. R. 778; Mallery v. Young, 94 Ga. 804; Moore v. Gubbins, 54 Ill. App. 163; Grimes v. Harmon, 35 Ind. 196; Primmer v. Primmer, 75 Iowa, 415, 39 N. W. R. 626; In re Geldthorpe, 94 Iowa (1895), 36; King v. Holmes, 84 Me. 219, 225, 24 Atl. R. 819; May v. Bradlee, 127 Mass. (1879), 414; Beaubien v. Cicotte, 12 Mich. 459, 487; Bush v. Delano (Mich., 1898), 71 N. W. R. 628; Harring v. Allen, 25 Mich. (1872), 505, 507; Cawthorn v. Haynes, 24 Mo. 236; Pemberton v. Pemberton, 41 N. J. Eq. 349 (1886), 7 Atl. R. 642; Brick v. Brick, 43 N. J. Eq. 467, 10 Atl. R. 869; In re Clark, 40 Hun (1886), 233; Waterman v. Whitney, 11 N. Y. (1854), 157; In re Lazak, 57 Hun, 417, 10 N. Y. Supp. 844; Kennedy v. Upshur, 66 Tex. 443 (1886), 1 S. W. R. 308; Maxwell v. Hill, 89 Tex. (1896), 584, 15 S. W. R. 253; Foster v. Dickerson, 64 Vt. 233 (1852), 24 Atl. R. 253. Thus, declarations which tend to show that the testator stood in fear of the principal beneficiary under the will are relevant. Evans' Will (N. C., 1898), 31 S. E. R. 267; Peery v. Peery, 94 Tenn. 328, 29 S. W. R. 1; In re Seymour (Mich., 1898), 69 N. W. R. 494. *Contra*, McFadin v. Catron (Mo., 1898), 25 S. W. R. 506. The declaration of the testator subsequent to the execution of the will, to the effect that he was sorry the contestant was not mentioned in it, is inadmissible. Kaufman's Estate (Cal., 1898), 49 Pac. R. 192. Where the question was as to the influence of the testator's sister in procuring the revocation of a will and the execution of a new one, his declarations, after making the new will, that she had been kind to him and had faithfully nursed him during sickness, have been received. In re Green's Will, 20 N. Y. Supp. 538, 22 N. Y. Supp. 1112, 67 Hun, 527. Where the will of the testatrix in favor of her husband was prepared in contemplation of marriage and executed immediately thereafter, letters written by her after marriage are admissible. In re Ross' Will, 65 Hun, 626, 20 N. Y. Supp.

§ 162. The declarations of the testator to explain inequality of distribution.—An inequality in the bequests is one circumstance which would, where the beneficiaries stand in equal degrees of relationship to the testator, suggest undue influence. That the testator had long prior to the execution of the will, when it indubitably appears that he could not have been under the influence of the favored persons, expressed an intention to discriminate, is very material. Such evidence tends to show that the provision in question was uninfluenced, and that it is the outcome of prior intention and deliberation.¹

§ 163. The declarations of the legatee or of an executor to show undue influence.—Upon the question whether a declaration of a legatee made after the execution of a will is admissible to show that it was procured by undue influence, there is a conflict of authority. The majority of the cases reject such evidence, reasoning, on general principles, that no one should be concluded by the unauthorized statements of others with whom he is in no way associated or identified in interest. The admission of a legatee is evidence against the will where he is the sole beneficiary under it.² But the interests of legatees under a will are several, not joint. Each claims independently of the others, and his interest should not be affected by the acts or declarations of the other legatees.³

520. An entry in a bank book of testatrix stating that she wished all her money to go to her husband is admissible, where the husband is contesting her will upon the grounds of undue influence. *Perry v. Moore*, 66 Vt. 519, 29 Atl. R. 806. Upon the same principles, letters written by the testator to his son, whom he has disinherited, are received to show that prior to the will the most affectionate relations existed between them. *Fuller v. Fuller*, 83 Ky. 345. "A will made when fraud or compulsion is used may nevertheless be shown to be the free act of the party, by proof of statements in which the will and its provisions are approved, made when relieved of any improper influence or coercion. It is always open to inquiry whether undue influence in any case operated to pro-

duce the will; and, as the will is ambulatory during life, the conduct and declarations of the testator upon that point are entitled to some weight. Indeed, the fact alone that the will, executed with due solemnity by a competent person, is suffered to remain unrevoked for any considerable time after the alleged causes have ceased to operate, is evidence that it was fairly executed, and to meet which, to some extent at least, statements of dissatisfaction with, or want of knowledge of, its contents are worthy of consideration and clearly competent, however slight their influence in overcoming the fact that there is no revocation." *Shailer v. Bumstead*, 99 Mass. 112.

¹ *Dye v. Young*, 55 Iowa, 433, 435.

² *Hayes v. Lurkam*, 67 Ind. 359, 363.

³ *Ormsby v. Webb*, 10 S. Ct. (1889)

The same reasoning will be applicable to bring about the rejection of the declarations of an executor offered for the purpose of showing undue influence. No privity of interest or community of purpose exists between him and any legatee which will admit his declarations to impeach the will whence the legatee derives a benefit.¹ The admissions of a legatee made prior to the date of the execution are rejected for the reason that, if made before he becomes a legatee, they are not declarations against his interest.² The declarations of beneficiaries are incompetent to prove undue influence only where they have a several interest under the will. The acts, admissions or declarations of one of several legatees who take a joint estate under a will are received against any or all the others

478, 134 U. S. 47; *Eastis v. Montgomery*, 93 Ala. 298, 9 S. R. 311; *Blakey v. Blakey*, 33 Ala. (1858), 611, 615; *Dale's Appeal*, 57 Conn. (1889), 127, 17 Atl. R. 757; *Harvey v. Anderson*, 12 Ga. 69; *Williamson v. Naber*, 14 Ga. 285; *Campbell v. Campbell*, 138 Ill. 612, 23 N. E. R. 1080; *In re Mary Ames*, 51 Iowa, 596, 603, 21 N. W. R. 570, 24 N. W. R. 564; *Dye v. Young*, 55 Iowa (1880), 438, 436, 7 N. R. 678; *Hayes v. Burkam*, 67 Ind. (1879), 359, 363, 1 Amer. Prob. R. 179; *Milton v. Hunter*, 13 Bush (Ky.), 163; *Roller v. Kling* (Ind., 1898), 49 N. E. R. 948; *Chapman v. Chapman*, 87 Ky. (1888), 140, 7 S. W. R. 901; *Carpenter v. Hatch*, 64 N. H. (1888), 573, 15 Atl. R. 219; *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. R. 1114; *Thompson v. Thompson*, 13 Ohio St. 353, 356; *Allen v. Allen*, 26 Mo. 327; *Clark v. Morrison*, 25 Pa. (1855), 453; *Nussear v. Arnold*, 13 S. & R. (Pa.) 323, 328; *Dillard v. Dillard*, 2 Strobb. (S. C.) L. 89; *Craine v. Clark*, 2 Murph. (N. C.) 317; *Peery v. Peery*, 94 Tenn. 328, 29 S. W. R. 1; *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. R. 233. *Contra*, *Beall v. Cunningham*, 1 B. Mon. (Ky.) 399; *Rogers v. Rogers*, 2 B. Mon. (Ky.) 324; *Brown v. Moore*, 6 Yerg. (Tenn.) 272.

(1879), 24 N. W. R. 564; *Phelps v. Hartwell*, 1 Mass. 71; *Shailer v. Bumstead*, 99 Mass. (1868), 112, 127; *Blakey v. Blakey*, 33 Ala. 611, 617, (1859). *Contra*, *Davis v. Calvert*, 5 Gill & J. 269; *Dennis v. Weeks*, 46 Ga. 514; *Peoples v. Stevens*, 8 Rich. Eq. (S. C.) 198. *Cf.* *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Baker v. Kingsland*, 10 Paige (N. Y.), 366; *Regan v. Grim*, 13 Pa. St. (1850), 508, 513; *Clark v. Morrison*, 125 Pa. St. 452, 453; *Morris v. Stokes*, 21 Ga. 552. "A mere community of interest is not sufficient. Devisees or legatees have not that joint interest which will make the admission of one, though he be a party appellant or appellee from the decree of the probate court allowing the will, admissible against the other legatees." *Shailer v. Bumstead*, 99 Mass. 112 (1868).

² *In re Goldthorpe*, 94 Iowa, 336, 344; *In re Ames*, 51 Iowa, 596, 600; *Benton v. Scott*, 3 Rand. (Va.) 399, 407; *Thompson v. Thompson*, 13 Ohio St. 353, 363; *Renaud v. Pageot* (Mich., 1898), 61 N. W. R. 3, 4; *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. R. 105; *Lightner v. Wike*, 4 S. & R. (Pa.) 203.

¹ *In re Ames*, 51 Iowa, 596, 603,

to show fraud or undue influence by them.¹ Thus, where a will was alleged to have been procured by undue influence, the result of a conspiracy by the wife of the testator and her relatives, the declarations of any conspirator in pursuance of the concerted plan are admissible against the will. Circumstantial evidence of the conspiracy is all that is required, and as the purpose of the conspiracy will only be completely accomplished at the death of the testator, declarations down to that date will be received.²

After the contestant of the will had introduced the declarations of the two legatees to show that they had expressed an opinion adverse to the testamentary capacity of the testatrix, and also an instrument in which they recited over their signature her great age and inability to manage her property, the legatees were permitted to prove that the opinion was the result of their ignorance, was signed without proper consideration, and because they secured important advantages by so doing, and they may state any good reason why the writing should not be considered against them, and, in any case, their opinion should be considered in connection with all the evidence.³

§ 164. Wills executed by a mistake.—It is highly improbable, on account of the deliberation and care with which a will is usually executed, that a person will, in the absence of fraud or force, execute the wrong instrument as a will. The object of all the formalities of attestation is to prevent the testator from being imposed upon by the substitution of another will, at the time of execution, in place of that which he has ordered to be prepared for him.

If by trick the signature of the testator is procured to an instrument purporting to be his will, but which does not express his voluntary intention, it is a species of undue influence savor-

¹ *Horn v. Pullman*, 10 Hun (N. Y.), 471. As, for example, to show that he endeavored to procure a third person to urge the testator to make a will in favor of himself and the joint devisee. *Smith v. Henline*, 51 N. E. R. 227, 174 Ill. 184. 75 Iowa, 415, 419, 420; *Lewis v. Mason*, 109 Mass. 169; *Shailer v. Bumstead*, 99 Mass. 112. The declarations must refer specifically to the procurement of the execution of the will by undue influence. *King v. Holmes*, 24 Atl. R. 819, 84 Me. 219.

² *Coghill v. Kennedy* (Ala., 1898), 24 S. R. 459; *Primmer v. Primmer*,

³ *Appeal of Dale*, 57 Conn. 127, 17 Atl. R. 757.

ing of fraud, and the will, so far as it does not represent his real wishes, must be refused probate. It is conceivable also that the testator may sign the wrong instrument inadvertently, as where two wills which are nearly similar in their provisions are prepared for execution by different testators, and each testator executes the instrument which was intended to be executed by the other.

Thus, where a husband and wife, intending to make mutual wills in favor of each other, had them drawn precisely alike, and, as they supposed, executed them properly, but, as it subsequently appeared, each had signed the other's will, the court held that the will of the husband was void and could not be reformed after his death, and evidence to show his intention and to prove the mistake was inadmissible.¹ And a similar decision was had in the case of two sisters, who, contemplating the execution of mutual wills, signed each other's will by mistake.² In this connection attention may be called to the rule that parol evidence is always admissible, including the declarations of the person, for the purpose of showing that he did not intend that an instrument which had been signed by him should operate as a will.³

§ 165. The forgery of the will — The burden of proof — Doctrine of reasonable doubt not applicable.— The contestant has the burden of proof under an allegation that the will was forged. The law will not presume the commission of a crime. He is not required to convince the minds of the jurors beyond a reasonable doubt that the signature to the will is a forgery, for the doctrine of reasonable doubt is limited to criminal trials, and is never invoked where the commission of a crime is in issue in a civil proceeding. A fair preponderance of the evidence is all that can be required.⁴

¹ *Nelson v. McDonald*, 16 N. Y. S. 273, 61 Hun, 406.

² *In re Hunt*, L. R. 3 P. & D. 250; *Anon.*, 14 Jur. 402.

³ *In Doe d. Small v. Allen*, 8 T. R. 147, the testator at the time of making his will inquired if it was the same as a former will. He was informed that it was, which statement was false. In permitting these facts

to be proved by parol, Lord Kenyon said: "Notwithstanding the statute of frauds, evidence may be given to show that a will was obtained by fraud, and the effect of the evidence in this case was to show that one paper was obtruded on the testator for another."

⁴ *McDonald v. McDonald*, 142 Ind. 55, 90, 41 N. E. R. 336. A charge re-

Thus, to illustrate: the evidence of experts that the signature was forged, and that derived from a comparison with other papers, together with proof that, though an attesting witness survived the testator four years, the will was not presented for probate until he was dead, with the fact that the will purported to dispose of property in which the testator had no interest whatever, as though he owned it, while the sister of the testator, whose name appeared on the will as an attesting witness, and who had since died, disposed of the property by her will without referring to the instrument offered for probate, is sufficient proof of forgery.¹

Any evidence which has a tendency to show that the signature to the will is forged is relevant. The contestant need not prove that any particular person forged the signature of the testator,² if he shall prove satisfactorily "that the name of the testator, as written at the end of the will, was not written by the testator himself, or by another person at his direction and with his consent." The evidence to prove the forgery must be permitted to take a wide range. The relations of the testator to the proponent of the will and to the beneficiaries under it, his feelings towards them and towards those who are contesting its validity, and the declarations of the testator, are all competent. The jury have a right, before determining whether the crime of forgery had been committed, to be placed in the circumstances surrounding the parties, and to have a full and, as far as possible, an accurate knowledge of all the facts.³ The

quiring the fact of forgery to be proved to a *reasonable certainty* is error. *McBee v. Bowman*, 89 Tenn. 132, 137, 14 S. W. R. 481, overruling *Hills v. Goodyear*, 4 Lea (Tenn.), 236.

¹ *Clark v. Ellis* (Ky., 1889), 28 S. W. R. 148. A holographic will should not be refused probate as forged, unless the proof shows with some certainty that it was forged. *Barlow v. Harrison* (La., 1899), 25 S. R. 378. "In cases where civil rights alone are involved, extreme strictness of proof, as regards the weight of evidence, is never required. The jury

may decide for either party, according to the probability and the weight of the evidence, its cogency, and the amount of credibility they may attach to it. The verdict will be sustained, it matters not how contradictory the evidence may be, so long as it is in favor of that litigant upon whose side the facts proved preponderate." *Underhill on Criminal Evidence*, § 9, p. 14. See, also, pp. 15-21.

² *McDonald v. McDonald*, 142 Ind. 55, 91.

³ *McDonald v. McDonald*, 142 Ind. 55, 90.

general rule is that any fact or circumstance which would be relevant upon the issue of fraud or undue influence will be received where it is alleged that the will was forged.¹

§ 166. Evidence of other forgeries — Expert evidence.— Evidence of similar forgeries, or of the possession of forged papers at or about the same time, is admissible in the case of a criminal prosecution for the crime of forgery, to show a uniform course of acting, from which guilty knowledge and the criminal intent may be inferred. And it is not material that the act constituting the possession or the use of forged papers occurred before or after the date of the alleged forgery for which the accused person is being tried. But even in a criminal trial, the evidence of other crimes wholly separate from, and independent of, the crime in issue, is not relevant to show that the accused committed the crime with which he now stands charged.² Where the commission of a forgery is involved in a civil trial, the intent is not material. Hence, the contestant cannot prove forgeries of other independent papers by the beneficiary, either as direct evidence that he forged the will or for the purpose of contradiction.³ But where it was alleged that a codicil was forged, the contestant was permitted to prove that a deed executed at the same time as the codicil and attested by the same witnesses had also been forged,⁴ the two forgeries

¹ See §§ 132, 134.

² See Underhill on Criminal Evidence, § 88. "He (the accused) can, with fairness, be expected to come into court prepared to meet the accusations contained in the indictment only, and, on this account, all the evidence offered by the prosecution should consist wholly of facts which are within the range and scope of its allegations. The large majority of persons of average intelligence are untrained in logical methods of thinking, and are, therefore, prone to draw illogical and incorrect inferences and conclusions without adequate foundation. From such persons jurors are selected. They will very naturally believe that a person is guilty of the crime with

which he is charged if it is proved to their satisfaction that he committed a similar offense, or any offense of an equally heinous character." Underhill on Criminal Evidence, § 87. The declarations of the testator which show an intention which is inconsistent with the intention stated in the will are not admissible to show that the will is forged. *Swope v. Donnelly* (Pa., 1889), 42 Atl. R. 882.

³ *Franklin v. Franklin*, 90 Tenn. 44, 16 S. W. R. 557.

⁴ *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. R. 308. The contestant ought not to be allowed to prove that a beneficiary under a will was addicted to the excessive use of intoxicating liquors and morphine, for the purpose of showing that his mind and

being connected as parts of the same transaction. The testimony of expert witnesses, who have made a study of the characteristics of handwriting, should always be received.¹

moral sense had become impaired, and that he was therefore the more capable of committing such a crime as forgery. *Franklin v. Franklin*, 90 Tenn. 44, 16 S. W. R. 557.

¹In *re Williams' Will*, 2 Con. Sur. 579, 13 N. Y. Supp. 828; In *re Beggs' Estate*, 34 Atl. R. 234, 173 Pa. St. 647. An elaborate discussion of the rules regulating the proof of handwriting cannot be given in this place. It may be well, however, to insert a short summary of them, stating, as concisely as may be, the broad general principles which have been adopted by the courts as a result of a century of litigation. The evidence of both the subscribing witnesses who were present at the execution that they actually saw the testator sign the instrument purporting to be his will, they, at the same time, identifying it as the writing whose execution they attested, is of great weight and usually conclusive of the genuineness of the signature. But the credibility of the attesting witnesses may be attacked and the forgery of the testator's signature be proved. The attesting witnesses may have been in a conspiracy to procure probate of a forged will, or *their names*, also, may have been forged, and they may have identified a writing as a will which they had never before seen. In the first place a witness who is personally acquainted with the handwriting of the testator may testify for or against the authenticity of the signature. His acquaintance with the writing may have been acquired by having

seen the testator sign his name, or by having carried on a correspondence with him. If the witness has received one or more letters from the testator which gave him directions or orders requiring his action, and he relied thereon and did so act, and if his actions met with the approval of the testator as shown by other letters, the witness is competent; or the witness may have acquired his knowledge of the handwriting of the testator by having been brought in personal contact with him in commercial, social or professional relations. Thus, a son may testify to the handwriting of his father; a book-keeper to that of his employer; an attorney to that of his client, and *vice versa*. Again, writing may be proved by comparison, which is, where a person gives his opinion of a writing after comparing it with another writing proved or admitted to have been written by the testator. In some of the states the jurors or the judge of probate may themselves make the comparison. In others the comparison may be made only by the witnesses, expert or otherwise. The expert may in general testify to the genuineness or non-authenticity of the signature, or specifically that it is cramped, crowded, artificial or apparently copied; as to the slant and peculiarities of the letters; the size, length and position of the signature; the condition and age of the paper, and whether the signature was written at the same time as the body of the will by the same person and with the same pen and ink.

CHAPTER VIII.

THE CHARACTER AND MODE OF EXECUTION OF NUNCUPATIVE WILLS.

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| <p>§ 168. The origin and definition of nuncupative wills.</p> <p>169. The request to the witnesses — Its character and purpose.</p> <p>170. Language which is sufficient as a request.</p> <p>171. The nuncupation must have been in the last sickness — What constitutes the last sickness.</p> <p>172. The limitation on value of property which may be disposed of.</p> <p>173. The testamentary capacity and <i>animus testandi</i> — The burden of proof and nature of the evidence required.</p> | <p>§ 174. The nuncupative will must have been oral.</p> <p>175. Oral wills of personal property at common law — Real property cannot be disposed of by a nuncupative will.</p> <p>176. Nuncupative wills of soldiers and sailors made while in actual service.</p> <p>177. Actual service and being at sea defined.</p> <p>178. Who is a mariner or soldier within the statute.</p> <p>179. Nuncupative wills in Louisiana.</p> |
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§ 168. The origin and definition of nuncupative wills.— At common law, prior to the passage of the Statute of Frauds, a will of chattels was valid without writing.¹ It was a custom in the earliest times for the deceased to dispose of his personal property orally. As the use of writing increased, so that in most cases there was at the bedside of the testator some one who could write, these oral wills were discouraged. By the end of the sixteenth century they were resorted to only in cases of extreme necessity. A nuncupative will is defined by the early writers, "as when a man lieth languishing for fear of sudden death, dareth not to set the writing of testament, and therefore he prayeth his curate and others to bear witness to his last will, and declareth by word, that is his last will."²

Naturally, to permit a testament to be proved by the oral evidence of bystanders after the death of the testator would result in great fraud and perjury. At last a case involving the

¹ 2 Black. 500.

² Perk. Conv., sec. 476; Swinburne, p. 32; Bacon, Abridg. 805.

grossest perjury in the probate of a will¹ led to the enactment of that section of the Statute of Frauds² in which it is enacted that no oral nuncupative will of personal property shall be good, where the estate exceeds the value of £30, which is not proved by three witnesses at least who were present at the making thereof; nor unless it also be proved that the testator, at the time of making it, did bid the persons present, or some of them, to bear witness that such was his last will, or to that effect; nor unless said nuncupative will was made at the time of the last sickness of the deceased, at the house of his or her habitation or dwelling, or where he or she had been resident for at least ten days before the making of the will; except where such person was unexpectedly taken sick away from home, and died before he or she returned to the place of his or her habitation. And it is also provided that after six months from its publication no testimony should be received to prove the will, unless it had been committed to writing within six days after the making of it, and that no letters should be issued to the executors of such will within fourteen days after the death of the testator, or until the widow or next of kin had been cited to appear. It was also provided that any soldier being in actual military service, or any mariner or seaman being actually at sea, might dispose of his movables or personalty as before the passage of this act. The provisions of the Statute of Frauds have been generally adopted in nearly all the states of the American Union. The amount which may be thus disposed of is limited in some of them, and, as the details of the various statutes differ greatly, they should be consulted in each case.

§ 169. The request to the witnesses—Its character and purpose.—By the statutes it is required that a testator executing a nuncupative will should, at the time of its execution, *request all or some of those who are present to bear witness*, or to take notice that this is his testament. The Statute of Frauds³ requires him, at the time of pronouncing the will, “to bid the persons present, or some of them, to bear witness that such was his will, or to that effect.” This is the *rogatio testium* of the civil law. The language of the Statute of Frauds does not require an express oral declaration by the testator that he is

¹ *Coles v. Mordaunt*, 4 Ves. 196, note. ³ Sec. 19.

² 29 Car. II., c. 3.

making his will. Words are not required; only a bidding, or "*to that effect.*" Most of the American statutes, expressly or by implication, require the testator to make an oral request; but no form of words is prescribed. Certainly it is not required that a man in his last sickness, and possibly *in extremis*, should use the exact phrases of the statute. Any statement by him which shows clearly that he is expressing a present intention to give his property by will, and that he desires some or all of those present to witness this intention, is sufficient. It is not necessary that he should call upon the witnesses by name. The purpose of the statutory provision is to draw a distinct line of severance between loose and casual statements of a *future testamentary intention* or instructions for a *future written will*, uttered in conversation with bystanders, and the testamentary act itself. If the language and the actions of the testator give the witnesses to understand that he is making an oral disposition of his property and that he desires them to bear witness that *this* is his will, the nuncupative will is valid.¹

§ 170. **Language which is sufficient as a request.**—A request by the testator to the persons present that his friends should be informed who are to have his property;² a statement that he wishes to make a disposition of his effects,³ or where, after stating he desired to dispose of his property, the testator said to those about him: "You all know what I want done; that is all I have to say;"⁴ or where, after expressly disposing of his property, he looked at the heir at law, who said "Yes," and then the testator said, "You see my father acknowledges it,"⁵ was held a sufficient compliance with the statute.⁶ All

¹ *In re Askins' Estate*, 20 D. C. 12; 266, 267; *Meisenhelter's Will*, 15 Arnett v. Arnett, 27 Ill. (1862), 244, Phila. 651; *Ridley v. Coleman*, 1 247; *In re Grossman's Will*, 75 Ill. Sneed (Tenn.), 616; *Winn v. Bobb*, 3 App. 224, 51 N. E. R. 750; *Weir v. Leigh* (Va., 1831), 140, 145; *Owens' Chidester*, 63 Ill. 453, 455; *Parkinson v. Parkinson*, 20 Miss. (1849), 672; Appeal, 37 Wis. 68, 72.

² *Gwin v. Wright*, 8 Humph. (27 Tenn.) 639, 645.

³ *Baker v. Dodson* (23 Tenn., 1844), 4 Humph. 842.

⁴ *Bradford v. Clover*, 60 Ill. App. 55.

⁵ *Parsons v. Parsons*, 2 Me. 298.

⁶ But a declaration, "Everything I give to Willie; everything is Willie's; I want everything to go to

the witnesses must be present when the declaration constituting the nuncupative will is uttered.¹ Under the Ohio statute, and also in Kentucky, a nuncupative will reduced to writing and signed or proved solely by the evidence of one of the legatees is void.² The statute requires disinterested witnesses. If the witness is interested at the execution, his incompetency cannot be removed by a subsequent release.³ The statute which provides that a legacy to a witness of a will shall be void, and the witness competent to prove the will, does not apply to nuncupative wills in Ohio.⁴

§ 171. The nuncupation must have been in the last sickness — What constitutes the last sickness.—The making of a nuncupative will must, under the Statute of Frauds and the analogous American statutes based upon it, be shown to have been an act of necessity, not of choice. The making of nuncupative wills is not favored by the law, and the provisions of the statutes which permit them must be closely complied with.

The statutes require that the nuncupative will shall be made "*in the last sickness*" of the testator. Some difference of opinion exists as to the proper meaning of this phrase. The majority of the cases hold that the testator must be actually *in extremis*, and without hope of recovery, when making his will. He must be *in articulo mortis*; for if it appears to the satisfaction of the court that he had sufficient time and opportunity to execute a formal and written will, the nuncupative will ought to be refused probate.⁵ Thus, where a person in a lingering

Willie. I want Willie to have everything. I intended to fix it so there would be no trouble, but it was put off," is not a valid nuncupative will. *In re Willey's Estate*, 187 Pa. St. 82, 40 Atl. R. 980.

¹ *Weeden v. Bartlett*, 6 Munf. (Va.) 123; *Wester v. Wester*, 5 Jones (N. C.) L. 95.

² Ohio R. S., § 5991; *Gill's Will*, 2 Dana (Ky.), 447.

³ § 192.

⁴ *Vroom v. Powers*, 47 Ohio St. 191, 24 N. E. R. 287.

⁵ *Sykes v. Sykes*, 2 Stew. (Ala., 1830), 364; *Askins' Estate*, 20 D. C. 12, 17; *Bellam v. Beeler*, 23 S. E. R.

387 (1895), 96 Ga. 467; *Scaife v. Emmons*, 84 Ga. 619, 621, 10 S. E. R. 1097; *Mulligan v. Leonard*, 46 Iowa (1877), 692; *O'Neill v. Smith*, 33 Md. 569, 578; *Donald v. Unger* (Miss., 1896), 22 S. R. 808; *Sadler v. Sadler*, 60 Miss. 251 (1882); *Carroll v. Bonham*, 43 N. J. Eq. 625, 9 Atl. R. 371, 26 Am. L. R. 568, notes, 25 Cent. L. J. 328; *Prince v. Hazleton*, 20 Johns. (N. Y., 1822), 502, 508; *In re Conaughton's Will*, 11 Pa. Co. Ct. R. 460; *In re Willey's Estate*, 6 Pa. Co. Ct. R. 691; *Werkheiser v. Werkheiser*, 6 Watts & S. (Pa., 1848), 184; *Yarnall's Will*, 4 Rawle (Pa.), 46, 65; *Boyer v. Frick*, 4 W. & S. (Pa., 1834), 357; *Haus v. Palmer*, 21 Pa. St.

sickness, but in no *immediate* danger of death, gave oral instructions as to the disposition of his property, and subsequently had abundant time and opportunity to make a written will, the oral expressions of intention were rejected as a nuncupative will.¹ But some authorities have sustained wills as nuncupative where the testator had time and opportunity to reduce his intentions to writing. They have relied upon the fact that as at the common law, independently of statute, it was not necessary that a nuncupative will should have been made in the last illness, no particular meaning attaches to the phrase, "time of last sickness," at the common law. They were at liberty to construe it. Accordingly, if the testator, impressed with the probability of approaching death, makes a nuncupative will in substantial conformity with the statute, it ought not to be invalid because he regains sufficient strength, and has the time and opportunity to have it put into writing.²

§ 172. Limitation upon the value of property which may be disposed of.—The value of personal property which may be disposed of by nuncupative will is usually limited by the statutes, and rarely exceeds \$300. The limitations upon the value of personal property have reference to its *nominal* and not to its *real* value. Hence, if it happens, in the case of a promissory note or other money obligation, that the maker becomes insolvent, so that only a portion of the value of the security is realized, the will is invalid if the face value of the note was in excess of the limit, though the actual value was under it.³ If a nuncupative will disposes of property beyond the limit of the statute, it will not be thereby void *in toto*, but must be enforced so far as it does not exceed the limit.⁴

§ 173. The testamentary capacity and animus testandi—The burden of proof and nature of evidence required.—Though a nuncupative will is usually valid only if made "during

296; *Martinez v. De Martinez* (Tex., 1899), 48 S. W. R. 532; *Moffett v. Moffett*, 67 Tex. 642, 644; *Jones v. Norton*, 10 Tex. (1853), 120, 122; *Reese v. Hawthorn*, 10 Gratt. (Va.) 548, 551; *Brunson v. Burnet*, 1 Pinney (Wis., 1841), 186; *Schouler on Wills*, § 365; 1 Redf. on Wills, p. 185.

¹ *Yarnall's Will*, 4 Rawle (Pa.), 46, 65.

² *Harrington v. Stees*, 83 Ill. 50, 55; *Johnson v. Glasscock*, 2 Ala. 242; *Nolan v. Gardner*, 7 Heisk. (Tenn.) 215. But see *post*, § 174.

³ *Stricker v. Oldenburgh*, 39 Iowa, 653, 655.

⁴ *Mulligan v. Leonard*, 49 Iowa, 692, 695.

the last sickness," the testator must have had testamentary capacity when he uttered the words, and a present intention that the words uttered should be his will. A reasonably strict compliance with the statutory requirements must be shown; the burden is on the proponent of the nuncupative will, and the evidence introduced must be clear and satisfactory; for, on account of the peculiar opportunity offered for fraud and perjury, nuncupative wills are not favored by the courts.¹

A substantial agreement of the witnesses who are called to prove the will should be required. If, however, they do not agree upon all the language of the deceased disposing of his property, his language, *so far as they do agree as to what he said, will constitute the will*, and to that extent it must be enforced.² The fact that nuncupative wills are usually made when the deceased is in his last illness, often renders them open to the objection of undue influence. A man on his death-bed has usually little mental strength to resist the coercion or importunity of those about him. If his mind is clouded, and he is semi-conscious, the nuncupative will may consist wholly of affirmative answers or gestures to leading and suggestive questions. That such a will is the product of pestering questions and pointed demands put to the deceased is a circumstance well calculated to cast suspicion upon it as the free product of his mind.³

§ 174. The nuncupative will must have been oral.—It must be proved that the deceased, while uttering the words offered as a will, had a *present testamentary intention*, and that he intended that the *very words then uttered*, and no others, should constitute his will. If he gives instructions for a will which is subsequently to be drawn up and executed in writing, and it is not done; or if he gives oral directions which are taken down in the form of a will, which he fails to execute as a formal written will because of his death, unconsciousness or

¹ Scaife v. Emmons, 84 Ga. 619, 621 (1889), 10 S. E. R. 1097; Weir v. Chidester, 68 Ill. (1872). 453; Morgan v. Stevenson, 78 Ill. 287; Mulligan v. Leonard, 46 Iowa (1877), 692, 694; Biddle v. Biddle, 86 Md. 630; Parkinson v. Parkinson, 12 Smedes & M. (20 Miss., 1849), 672.

² Portwood v. Hunter, 6 B. Mon. (45 Ky.) 538, 540; Mulligan v. Leonard, 46 Iowa, 692, 694; Marks v. Bryant, 4 Hen. & Mun. (Va., 1809), 91.

³ Males' Case, 49 N. J. Eq. 266, 287; Green v. Skipworth, 1 Phil. 53. Cf. ante, § 144.

delirium coming on before he can do so, the writing cannot be sustained as a nuncupative will.¹ This is now the universal rule, though in England, prior to the statute of Victoria, writings which purported to be wills of personal property were admitted to probate in the ecclesiastical courts as valid wills, though not written or signed by the testator.² So, also, written instructions for wills were received by these courts and probated, where the testator was prevented by *unavoidable accident* from executing a formal will.³

§ 175. Oral wills of personal property at common law — Real property cannot be disposed of by a nuncupative will. It is elsewhere pointed out that, although land was originally devisable, it afterwards became impossible, until the passage of the Statute of Wills, to devise it.⁴ That statute provided that no devise of land should be valid unless executed in writing, with proper formalities. But at common law wills of chattels were still good without writing; and usually, because of the illiteracy of testators and of those about them, written wills were infrequent. This continued to be the rule long after the passage of the statute 29 Charles II., c. 3, which regulated the subject of nuncupative wills, requiring their proof by three witnesses present at the making, and who were required by the testator to bear witness to his oral will. But it never has been possible for a testator to dispose of his real property by nuncupative will.⁵

¹ *In re Hebden's Will*, 20 N. J. Eq. (1869), 473; *In re Males' Will*, 24 Atl. R. 370, 49 N. J. Eq. 266, 283; *In re Grossman*, 75 Ill. App. 224, 51 N. E. R. 750; *Porter's Appeal*, 10 Pa. St. 254; *Reese v. Hawthorn*, 10 Gratt. (Va., 1853), 548, 551; *Hunt v. White*, 24 Tex. 643. Compare *Fouche's Estate*, 23 Atl. R. 547, 10 Pa. Co. Ct. R. 468.

² *Rhymes v. Clarkson*, 1 Phil. 22; *Bone v. Spear*, 1 Phil. 345; *Read v. Phillips*, 2 Phil. 122; *Bonstable v. Steible*, 1 Hagg. 56.

³ *Goodman v. Goodman*, 2 Lee, 109; *Robinson v. Chamberlayne*, 2 Lee, 129; *Green v. Skipworth*, 1 Phil. 53; *Nathan v. Morse*, 3 Phil. 529; *Allan*

v. Manning, 2 Add. 490; *Musto v. Sutcliffe*, 3 Phil. 104.

⁴ *Ante*, § 3.

⁵ *Gillis v. Weller*, 10 Ohio (1841), 462; *Ashworth v. Carleton*, 12 Ohio St. 381, 385; *Moffett v. Moffett*, 67 Tex. 642 (1887), 4 S. W. R. 70; *Furr v. Winston*, 66 Tex. 521, 1 S. W. R. 527; 4 Kent, Com. 503, 516; 3 Washb. R. P. 535; *Schouler, Wills*, § 15; 2 Bl. Com. 373. In England, prior to the statute of Victoria, wills of personal estate were not required to be attested or signed by the testator, and drafts of wills, or written memoranda made by or for the testator, were admitted to probate in the ec-

§ 176. **Nuncupative wills of soldiers and sailors made while in actual service.**—The wills of soldiers and sailors are exempted by the Statute of Frauds, and similar statutes, from the provisions regulating the execution of nuncupative wills. This exemption is, and always has been, liberally construed. In order that such wills, orally framed, and executed without the statutory formalities, shall be probated, it is not generally necessary that the soldier or mariner should have been *in extremis* when the will was uttered, provided he was in *actual service*, or *at sea*, at the time. The main difficulty lies in determining whether the sailor is at sea, or whether the soldier is in actual service, when he makes a nuncupative will. By the requirement of *actual service* it is not meant that the soldier must be *in battle* or in *immediate anticipation of death*, but that he must be *before the enemy*, or in the *enemy's country*, or engaged in an expedition and actually *exposed to the perils of warfare*. Such nuncupative wills, being based on necessity, are not valid if made by one who is still in camp in the state where his regiment was enlisted, though such a will may be adopted by the soldier as a valid nuncupative will when subsequently exposed in the enemy's country.¹ An oral will uttered by a soldier while on furlough or while in camp cannot be sustained as a nuncupative will, unless upon the grounds that it was uttered during his last illness. But if, because of illness contracted in the line of his duty, the soldier is sent to a hospital, where he dies, he will be regarded as being then in actual service as respects any oral will made by him.²

§ 177. **Actual service and being at sea defined.**—The nuncupative will of a mariner, to be valid, must have been made while he was at sea. The difficulty is to determine the meaning of the expression "*at sea*." It does not mean that a will is

clesiastical courts as valid written wills, *not nuncupative*. By that statute, and by statutes in the various states of the Union, wills of real and personal property were placed on the same footing as regards the formalities of their execution and attestation. See *ante*, § 174.

¹ *Deuzer v. Gardner*, 39 Vt. (1866), 111. In one case, during the war of the Rebellion, a very informal letter

written by a soldier during his illness in camp, in the presence of the enemy, to his relations at home, informing them how he wanted his property disposed of in case of his death, was held to be a valid will as a nuncupative will. *Botsford v. Krake*, 1 Abb. Pr. (N. S.) 112; *Leathers v. Greenacre*, 53 Me. 561, 574 (1865).

² *Gould v. Safford*, 39 Vt. 498.

valid only if executed during the time the ship was out of sight of land; for wills made by nuncupation have been probated where the ship was in the harbor, and even where the mariner was on land, absent from his ship on shore leave. The true criterion is, Was he performing the duties of his avocation as a sailor, under such circumstances as will prevent him from making a formal written will? If he is doing this, it matters not that, at the time of nuncupation, he is absent on shore leave, or is sick on board his ship while it is in port lying at the wharf.¹

§ 178. **Who is a mariner or soldier within the statute.**—Another question is, who is to be included within the term “mariner” or “soldier” under the statute? The meaning of both words is broad and inclusive. A mariner means every person who is engaged in the naval service, or in the mercantile marine, whatever his duty or position on a vessel; it is not limited to any particular class of persons who are on the ship. Any one who is actively employed, either in navigating, controlling or caring for the ship, or for its tackle, armament or crew, is a mariner within the statute. Thus an engineer, stoker or a coal-passer in the engine room, a purser, cook or steward in the cabin, or a surgeon or chaplain, is no less a mariner, as that word is employed in the statute, than the man who actually attends to the steering or navigation of the ship. The same rule of construction is applied to the word “soldier,” which will embrace every one from the private to the general, and every branch of the service, including not only the fighting force, but those also who attend to the feeding and transportation of the army and to the care of the sick and wounded.²

§ 179. **Nuncupative wills in Louisiana.**—The testamentary law of Louisiana, based upon the regulations of the Code Napoleon, divides wills into three classes, *i. e.*, nuncupative or open, mystic or sealed, and holographic.³ A nuncupative testament is one which is executed by a public act before a notary, and is received by him in the presence of three witnesses who are residents in the place where the will is executed, or of five who are not residents. If the nuncupative will is executed privately, there must be five resident, or seven non-resident,

¹ Ex parte Thompson, 4 Bradf. (N. Y.) 154.

² See remarks of Bradford, Surr., in Ex parte Thompson, 4 Bradf. 154, 158.

³ Code La., § 1574.

witnesses, and the testator may produce before the witnesses his will already made, and acknowledge it to be such.¹ The mystic testament is to be signed by the testator himself, sealed² and given to a notary in the presence of seven witnesses, the testator at the same time declaring that it is his last will. The envelope must then be indorsed by the notary, with a declaration of all the facts, which shall be signed by him and the witnesses.³ The holographic will is one entirely written and signed by the testator himself, and its execution is subject to no other formality. A nuncupative will must state that it was dictated by the testator, written by the notary, and that all the formalities of the statute were complied with.⁴ The omission of the statement of any necessary fact cannot be supplied by parol evidence.⁵ The declaration of the testator that he cannot sign his name to a nuncupative will, attested by the notary in his certificate, takes the place of the signature required by the code; the mark of the testator may be omitted.⁶ The notary who writes the nuncupative will may properly question the testator to ascertain his intention; and where the latter is an uneducated person, not gifted with fluency of language, or where he employs words of vague and doubtful signification, the notary may clothe his meaning in formal language if the exact intention of the testator is preserved inviolate.⁷

¹ Code La., §§ 1578, 1581.

² *Saint v. Hospital*, 48 La. Ann. 236, 19 S. R. 275.

³ Code La., §§ 1584, 1587.

⁴ *Succession of Murray*, 41 La. Ann. 1109, 7 S. R. 126; *Succession of Vidal*, 44 La. Ann. 41, 10 S. R. 414; *Succession of Del Escopal*, 42 La. Ann. 1086, 8 S. R. 268; *Miller v. Schumaker*, 42 La. Ann. 398, 7 S. R. 456.

⁵ *Weick v. Henne*, 41 La. Ann. 1158, 5 S. R. 528; *Dorrie's Succession*, 37 La. Ann. 833. The following has been laid down as a sufficient statement that all the formalities were complied with under the code: "The above and foregoing was written by me, said notary, as dictated by the testator (naming him), in the presence and hearing of (naming the

witnesses), and then read by me, said notary, to the testator, in the presence and hearing of the said witnesses, all at one and the same time, without interruption, and without turning aside to other acts." *Monroe v. Liebman*, 16 S. R. 734, 47 La. Ann. 155.

⁶ *Hennessy's Heirs v. Woulfe*, 22 S. R. 394.

⁷ *Succession of Saux*, 46 La. Ann. 1423, 16 S. R. 334. The witnesses are required to understand the language in which the will was dictated and in which it was written. If a witness does not understand its language, the will is void, despite the fact that what was said was translated to him. *Succession of D'Auterive*, 39 La. Ann. 1092, 3 S. R. 341.

CHAPTER IX.

THE EXECUTION AND ATTESTATION OF WRITTEN WILLS—THE EFFECT OF RE-EXECUTION.

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| <p>§ 180. The will must be in writing.</p> <p>181. Rule as to dating a will.</p> <p>182. Attaching a seal to the will.</p> <p>183. The validity of wills written in lead pencil.</p> <p>184. The place for the signature of the testator.</p> <p>185. What constitutes a signing at the end—Holographic wills.</p> <p>186. Whether a will not signed at the end is partly or wholly void.</p> <p>187. The signature of the testator may be made by a mark.</p> <p>188. Guiding the hand of the testator.</p> <p>189. Signature of the testator affixed by the hand of another.</p> <p>190. When the acknowledgment of the signature by the testator is sufficient.</p> <p>191. The necessity that the testator shall request the witness to attest.</p> <p>192. The competency of subscribing witness — He must be competent at the date of execution.</p> <p>193. The competency of a legatee as an attesting witness.</p> <p>194. The place for the subscription of the witness.</p> <p>195. The order of signing by the witness.</p> <p>196. The witnesses must attest in the presence of the testator.</p> <p>197. The attesting witnesses need not sign in the presence of each other.</p> | <p>§ 198. The signature of the witnesses by mark.</p> <p>199. Minors as attesting witnesses.</p> <p>200. The omission of a formal attestation clause.</p> <p>201. The value and admissibility as evidence of a perfect and formal attestation clause where the attesting witnesses are absent, hostile or forgetful.</p> <p>202. The necessity for the publication of the will by the testator at the time of its execution.</p> <p>203. The mode of the publication of the will.</p> <p>204. The publication of the will by acquiescence or actions.</p> <p>205. The competency of the person named as executor or as trustee as a subscribing witness.</p> <p>206. The competency of a husband or wife of a legatee as a subscribing witness.</p> <p>207. The competency of a member of a corporation which is a beneficiary.</p> <p>208. The legal or medical adviser of the testator as a subscribing witness.</p> <p>209. The republication by the execution of a codicil attested by competent witness.</p> <p>210. Substitutionary proof of execution in case of the death, absence or insanity of a witness.</p> <p>211. Forgetfulness of the subscribing witness.</p> |
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| <p>§ 212. The impeachment of the attesting witness if he is hostile.</p> <p>213. The mode of impeaching a hostile subscribing witness.</p> <p>214. Statutes disqualifying interested persons as witnesses to transactions with the testator.</p> <p>215. Re-execution defined.</p> | <p>§ 216. The constructive re-execution of a will by a codicil.</p> <p>217. The mode of re-execution.</p> <p>218. When the presumption of constructive republication may be rebutted.</p> <p>219. The effect of re-execution on after-acquired land.</p> <p>220. Re-execution of holographic wills.</p> |
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§ 180. **The will must be in writing.**—The statute 29 Car. II., c. 3, commonly known as the Statute of Frauds, required¹ that all devises or bequests of lands or tenements which are devisable under the Statute of Wills² or by custom must be in writing and signed by the party devising the same, or by some other person in his presence, and by his direction or request, and that such devise should be attested and subscribed in the presence of the testator by three or four credible witnesses. The provisions of this statute have been adopted by necessary implication as a part of the common law or expressly re-enacted in nearly every state of the American Union, with the additional requirement, in express terms, in several of the states, that the testator must declare that the instrument is his will in the presence of the attesting witnesses. A will of freehold lands was required to be in writing under the Statute of Frauds; and by the statute 1 Vict., c. 26, and the statutes of the several states, the same requirement is applicable to a will disposing of personal property alone. The statutes are silent as to the material with which, or upon which, the writing must be inscribed. Paper or parchment is most commonly employed for testamentary purposes, though it is very probable that almost any substance which is capable of being written upon would not be rejected. Thus a will written upon a slate might be admitted to probate.³

A will consisting of a printed form, with the blanks properly filled in, constitutes a sufficient compliance with the statutory requirement that a will shall be in writing, except in the case

¹ See sec. 5.

² 32 Henry VIII., c. 1.

³ "There is no statutory or legal requirement that a will shall be drawn on a particular kind of paper, or with the same ink, or exclusively in ink,

or all at one time; and there is no presumption that blank spaces left for the insertion of names and amounts in a will were filled in after execution." *Matter of Will of Tighe* (Fitzgerald, Sur.), 19 N. Y. Law Jour 1867.

of holographic wills, which are required to be wholly written by the testator.¹ It is in the highest degree advisable that the will should be legibly written in durable black ink upon paper, parchment or other substance that is strong, durable and calculated to resist the action of time and decay. A typewritten will is unquestionably in writing within the meaning of the statute. But the employment of such a method of recording the intentions of the testator is not to be encouraged, on account of the great facility with which the dispositive portions of the instrument may be erased, and other clauses substituted, without any great danger of detection at the probate or after the death of the testator.²

§ 181. **The rule as to dating a will.**—The general rule is that a will need not be dated,³ except in those states where holographic wills are permitted to be proved, where the statute usually requires such wills to be dated.⁴ It is always proper, and usually advisable, to insert the date of its execution in the instrument; for though this may be supplied, under the rule, by extrinsic evidence, it may be difficult to procure such evidence at the probate or at any time after the death of the testator, when it may be most essential in order to ascertain whether the will in question has been revoked by another writing alleged to have been executed subsequently. Where the date is given it may be contradicted by parol, though until this is done it will be presumed, in the case of a holograph, that the will was executed upon the date which is stated in it.⁵

§ 182. **Attaching a seal to the will.**—A seal is not generally required to be attached to a will under the existing stat-

¹ *Ante*, § 9.

² The employment of printed blanks for wills, having the blank spaces filled in either by the draughtsman or the testator, is not advisable, for the reason that by carelessness, or because of a failure or neglect to read the printed portion, something may be permitted to remain in the will as it is executed which was intended to be omitted. No care or skill in the chirographical preparation of a writing which is of so solemn a nature and so important in its effect as a

will can be too great. See *post*, § 186, where a will written on a printed blank was void; and also *post*, § 258, where the danger of using printed forms is strikingly illustrated.

³ *In re Haviland's Will*, 40 N. Y. Supp. 973, 17 Misc. R. 193; *Deakins v. Hollis*, 7 Gill & J. (Md., 1835), 311; *Doran v. Mullen*, 78 Ill. 342; *Wright v. Wright*, 5 Ind. (1854), 389.

⁴ See § 9.

⁵ *Sawyer v. Sawyer*, 7 Jones, Law (N. C.), 134, 140.

utes,¹ except in the state of New Hampshire.² In the state of Ohio a seal was required by statute to a will passing real estate, but this statute was subsequently repealed.³ Seals are very frequently attached to wills under the impression that the act of sealing lends an additional solemnity to the execution of the instrument. Where the character of the paper is dubious or ambiguous, and the question arises whether it is a deed or a will, the fact that it is sealed may, not alone but in connection with other facts, determine its character; but the addition of a seal to a writing of a testamentary nature and intended to operate as a will does not alone make it a deed.⁴

§ 183. **The validity of wills written in lead pencil.**—A will written in lead pencil is, if properly executed, unquestionably valid.⁵ No presumption of law exists against the testamentary character of a pencil writing, provided it is shown that it represents the final and complete testamentary intention of the deceased. The English cases seem to favor a presumption that pencil writings, or at least pencil alterations and interlineations, are deliberative and not final.⁶ Thus, some of the earlier authorities intimate strongly that a signature in pencil raises a presumption that it is deliberative merely, which would necessitate clear evidence of finality to overcome.⁷ But in every proceeding to probate a will, whether written in ink or pencil, it is necessary to show that the instrument was properly executed, and that it is a complete and final testamentary writing; and it is not requisite to introduce any greater or

¹ *In re Dies*, 50 N. Y. 88; *Avery v. Pixley*, 4 Mass. 460, 462; *Piatt v. McCullough*, 1 McLean, C. C. 69; *Hight v. Wilson*, 1 Dall. (U. S., 1787), 194; *Wright v. Wakeford*, 17 Ves. 458.

² Cases cited in note 1.

³ *Williams' Lessees v. Burnet*, *Wright* (Ohio, 1832), 53, 55.

⁴ *Wuesthoff v. Germania Life Ins. Co.*, 107 N. Y. 580, 592, 14 N. E. R. 811. See *ante*, § 87 et seq.

⁵ *Appeal of Knox*, 131 Pa. St. 220, 25 W. N. C. 133, 18 Atl. R. 1021; *Tomlinson's Appeal*, 133 Pa. St. 245; *Myers v. Vanderbelt*, 84 Pa. St. 510, 513; *Philbrick v. Spangler*, 15 La.

Ann. 46; *In re Adams*, L. R. 2 P. & D. 367; *In re Dyer*, 1 Hagg. 219; *Rymes v. Clarkson*, 1 Phillim. 22; *Dickenson v. Dickenson*, 2 id. 173.

⁶ See § 230, Cancellations and alterations in pencil.

⁷ "All the cases show that a signing in pencil affords a *prima facie* presumption that the act is only deliberative; yet it may be shown to be otherwise." Lord Brougham in *Bateman v. Pennington*, 3 Moo. P. C. C. 223, 227. This, however, was not a will. See *Lucas v. James*, 7 Hare, 410, 417; *Walker v. Walker*, 1 Gratt. (Va., 1845), 454.

higher degree of such evidence in the one case than in the other.¹

§ 184. **The place for the signature of the testator.**—Construing the Statute of Frauds, the English courts held that it was wholly immaterial in what part of the will the name of the testator was inserted. The writing of the name of the testator by himself, or even by some other person for him, in the body of the instrument or elsewhere on the paper, if it was intended as a signature, complies with the requirement of that statute; and subscription, *i. e.*, a signing at or after the end of the will, may be dispensed with, if it shall appear that the testator did not intend to subscribe the will, and the will was published and the signature subsequently acknowledged.² This construction of the English Statute of Frauds, by which signing at the end or foot of the will was dispensed with, was followed in some of the United States, the statutes of which, regulating the execution of wills, have been modeled upon the English enactment.³

This rule was repealed as to English wills executed after the year 1837 by the provisions of a statute⁴ which required that a will shall be signed at the foot or end thereof, either by the testator or by some other person in his presence and at his direction. The courts of ecclesiastical jurisdiction, in construing this provision, accepted the words "at the end or foot" in their most literal sense. It was held that if the subscription did

¹ Where there were pencil writings written in blank spaces left in a will, and these writings wholly or partly erased with other writings inserted, with ink writings over other writings wholly or partly erased, the court permitted the will to be probated with the pencil writings in blank and the ink writings as they appeared. It was proved that the will had been in the possession of the testator for years, inclosed in a sealed envelope, and that he had delivered it to a person who had deposited it in a safe-deposit box. *In re Tighe's Will*, 58 N. Y. S. 718, 24 Misc. R. 459.

² The leading case on this point is *Lemayne v. Stanley*, 3 Lev. 1, decided

four years after the passage of the statute. The rule laid down in that case was followed in *Hilton v. King*, 3 Lev. 16; *Right v. Price*, Doug. 241; *Wright v. Price*, 1 Peere Wms. 771; *Saunderson v. Jackson*, 3 Bos. & Pul. 238; *Coles v. Trecothick*, 9 Ves. Jr. 249; *Morison v. Turnour*, 18 Ves. 176; *In re Clark*, 2 Curt. 829; *Addy v. Grix*, 8 Ves. 505; *Vin. Abr.*, tit. Dev. N. 7; *Com. Dig.*, tit. Dev. E. 1.

³ *Allen v. Everitt*, 12 B. Mon. (Ky.) 871, 878 (1851); *Miles' Will*, 4 Dana (Ky.), 1, 6; *Armstrong v. Armstrong*, 29 Ala. 538, 541; *Ramsey v. Ramsey*, 18 Gratt. (Va., 1856), 665; *Roy v. Roy* (Va., 1863), 16 Gratt. 418, 419.

⁴ 1 Vict., c. 26, sec. 9.

not immediately follow the last dispositive clause, or, in other words, if anything could be inserted between the end of the will itself and the signature appended to it, the statutory requirement was not complied with, and probate should be refused. In consequence of the inconvenience caused by this strict adherence to the letter of the statute, an explanatory statute¹ was subsequently enacted, to the effect that a will shall be regarded as signed at the foot or end, within the meaning of the statute referred to, "if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to, the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect, by such signature, to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause, or of the clause of attestation, either with or without a blank space intervening, or shall follow, or be after, or under, or beside the names of one or more of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper, on which the will is written, to contain the signature," etc. The local statutes of the several states of the American Union usually require either that the will shall be subscribed,² or that it shall be signed "at the end."³

§ 185. **What constitutes a signing at the end of the will — Holographic wills.**—In construing statutory requirements that the will shall be signed by the testator "at the end thereof," the courts have held that a will is signed at the end when the signature follows all disposing portions of the will.⁴ The fact that a blank space is interposed between the dispositive por-

¹ 15 and 16 Vict., c. 24.

³ As in Pennsylvania, by Act of 1833.

² As in New York. 2 R. S., p. 63, sec. 40.

⁴ See note, 6 L. R. A. 353.

tion of the will and the signature of the testator is never material.¹ The signature of the testator need not immediately follow the last word of the will. It is required, however, that the signature of the testator shall come after all the dispositive portions of the will; and where this is not the case the will is not signed at the end.²

Thus, where the testator, after the valid execution of a will upon a printed blank which was completely filled and properly signed at the end, attached, by means of metal fasteners, other dispositive clauses written on separate sheets of paper, but unsigned, to the printed blank, referring to them by the words "see annexed sheets," it was held that the whole will was invalid and must be refused probate, not having been signed at the end as required under the statute.³

An attestation clause is neither indispensable nor is it, when it is employed, a necessary part of the will itself.⁴ A signature made *after* an attestation clause, which itself comes *after* and at the end of the will, is a sufficient compliance with the statute requiring a subscription. So, on the other hand, the fact that the signature of the testator is *immediately above an attes-*

¹ In re Dayger, 54 Hun (N. Y.), 129; Hitchcock v. Thompson, 6 Hun (N. Y.), 279; In re Gilman, 38 Barb. (N. Y.) 364. Leaving a space between the signature and the attestation clause is not material if the former is at the end of the will. In re Singer's Will, 44 N. Y. S. 606.

² In re Gedney's Will, 41 N. Y. Supp. 205, 17 Misc. R. 500; In re Booth's Will, 127 N. Y. 109, 27 N. E. R. 826, 57 Hun, 587; affirmed, In re Sander-son's Will, 9 Misc. R. 574, 30 N. Y. Supp. 848; In re O'Neil's Will, 91 N. Y. 518, 524; In re Conway's Will, 124 N. Y. 458, 460; Sisters of Charity v. Kelly, 67 N. Y. 409; Butler v. Benson, 1 Barb. (N. Y.) 526, 538; Wineland's Appeal, 118 Pa. St. 37, 12 Atl. R. 301; Fouché's Will, 147 Pa. St. 395, 23 Atl. R. 547.

³ In re Whitney's Will, 47 N. E. R. 272, 153 N. Y. 259, reversing 35 N. Y. Supp. 798. See also In re O'Neil's

Will, and In re Conway's Will, *supra*. The whole of the disposing portion of a will was written upon the first page of a sheet of foolscap folded down through the middle. The second and third pages were blank, and the signatures of the testator and the witnesses were on the last page. Held a valid signature at the end. In re Fuller, L. R. Prob. (1892), 377. "Can we say that the end of the will has been found until the last word of all the provisions of it has been reached? To say that where the name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is, there shall be the name. It is to make a new law to say that where we find the name there is the end of the will." Sisters of Charity v. Kelly, 67 N. Y. 409.

⁴ *Post*, § 200.

tation clause is immaterial, if the signature is at the end of the will within the requirements of the statute.¹

Signing at the end, in the case of a holographic will, furnishes the best, and frequently the *only*, proof that the will is complete. No attestation or subscription by witnesses is required, and no acknowledgment need be made before them.

What evidence of finality is there in a holographic will where the name of the testator appears only at the top? The placing of the signature in the body of the instrument is equivocal, requiring clear proof that it was placed there with the design of authenticating the holograph as a will. And in the absence of this proof, a presumption that the paper is a draft and deliberative merely is very reasonable.²

§ 186. Whether a will not signed at the end is partly or wholly void.—The question arises, in case the will is not signed by the testator *at the end* of the whole will, but is signed by him after one or more dispositive clauses, and before another dispositive part, whether the will is valid *so far as it is properly signed*, or *whether it must fall altogether*. Some authorities hold that a failure to sign the will *at the end* invalidates the *whole* will. For, if it appears from the nature of the disposition that the testator regarded the instrument as one and indivisible, so that it must stand or fall as one, the court has no right to divide it. If, after a will is executed, the testator attempts to add to or alter it in some material respect, it is clear that the will thus attempted to be altered was not a final and complete expression of the intention of the testator, and that, for this rea-

¹ *Younger v. Duffie*, 94 N. Y. 535, 541; *Jackson v. Jackson*, 39 N. Y. 153. A signing under a certificate made by a notary immediately after the will, stating the circumstances of execution, is a good subscription. *Page v. Donovan*, 3 Jur. (N. S.) 220. See also, as to signing at or after an attestation clause, *In re Walker*, 2 Sw. & Tr. 354; *In re Huckvale*, L. R. 1 P. & D. 375; *In the Goods of Cashmore*, L. R. 1 P. & D. 653.

² *Waller v. Waller*, 1 Gratt. (Va., 1845), 454, 479. In Virginia a holographic will, commencing with the

phrase, "I, A. W., of the county of H., declare this to be my last will and testament," inclosed in an envelope on which, in the testator's handwriting, appeared the words, "My will.—A. W.," but not signed in any manner with the name of the testator, is invalid under the statute (Code Va., 1887, § 2514) requiring a will to be signed by the testator, or by some one for him, "in such manner as to make it manifest that the name is intended as a signature." *Warwick v. Warwick*, 86 Va. 596, 10 S. E. R. 843. See also *ante*, § 9.

son, it ought not to be probated as his last will.¹ In a recent case² the instrument was written on a sheet of paper, at the foot of which was printed a form for the signature and attestation clause. The testator signed at the bottom of the sheet. After that portion of the will which was followed by the signature, the testator wrote: "Carried to the back of the will," and, turning the paper over, added several substantial provisions, beginning with the word "continued" and ending with the words: "Signature on the face of the will." He did not sign this latter portion. It was held, by a divided court, that the whole will was invalid for the reason that it was not signed at the end as required by the statute.³ And the same rule was recognized where the will was written on a printed blank, and a portion of the will, which could not be inserted in the space intended for that purpose in the form, was carried over to another page, and added *after* the signature of the testator.⁴

Many of the authorities hold that the part of the instrument which is properly executed as the last will of the testator may be admitted to probate as a will, the portion following the signature of the testator being altogether disregarded. This rule has been applied in cases where, after the valid signing and execution of a will, the testator added a codicil which he failed to sign,⁵ or where he gave certain instructions to the draughtsman, who wrote them down on a slip of paper and pasted this on the will after the signature.⁶ The addition of an unsigned and unattested clause, which does no more than appoint an executor, will not invalidate a will which is properly signed. The ancient rule that no valid will can be executed unless an executor is appointed⁷ is no longer recognized, and as the appoint-

¹ *Glancy v. Glancy*, 17 Ohio St. (1866), 134, 137; *Hays v. Harden*, 6 Pa. St. 409, 413.

² *Conway's Will*, 124 N. Y. 455 (1890), 26 N. E. R. 1028.

³ 2 R. S. N. Y., p. 63, § 40.

⁴ *O'Neil's Will*, 91 N. Y. 516, 3 Am. Pro. R. 135.

⁵ *Smith's Estate*, 9 Pa. S. Co. Ct. R. 333.

⁶ *In re Stevens' Will*, 6 Dem. Sur. 262, 3 N. Y. Supp. 813. See also *Baker v. Baker* (Ohio), 37 N. E. R.

125; *Mandelick's Will*, 26 N. Y. Supp. 888; *In re Anstee*, L. R. (1893), Prob. 283. Where the testator, having executed a will on paper folded in four pages, signed at the end of the first page, though he added a portion of one of the clauses on the second and third pages, the first page only of the will was admitted to probate and the balance was disregarded. *Royle v. Harris*, L. R. Prob. (1895), 163, 167.

⁷ *Ante*, § 6.

ment, though invalid, is not essential to the validity of the will, it may be disregarded.¹

§ 187. The signature of the testator may be made by a mark.—The signature of the testator made by his mark, or even by an illegible scrawl, where the testator was too feeble to make a mark, and notwithstanding the name of the testator does not appear anywhere in the will,² is as effective to authenticate the will as the name of the testator written out in full.³ It is not material to prove that the testator knew how to write, if from any cause he is physically unable to do so. If from disease, or weakness, or old age his physical powers and strength are so far diminished that he is unable to make the manual motions involved in writing his signature, he may make a mark, or it may be made for him by another.⁴ In Pennsylvania, by

¹ *Brady v. McCrosson*, 5 Redf. (N. Y.) 431; *Dallow's Case*, L. R. 1 P. & D. 189. The case of *Wineland's Appeal*, 118 Pa. St. 37, 1 Am. Prob. R. 349, on this point is clearly not law. Where the deceased signed his name on five sheets of a will, consisting of six sheets, and the names of the witnesses appeared on each of the five sheets, and on the sixth there were a testimonium and an attestation clause, and the names of the witnesses, but not the signature of the testator, the court held the whole will was invalid. *Sweetland v. Sweetland*, 4 Sw. & Tr. 6, 9 (1885).

² In *re Bryce*, 3 Curt. 325.

³ In *re Mullin's Estate*, 110 Cal. 252 (1895), 42 Pac. R. 645; *Estate of Toomes*, 54 Cal. (1880), 509, 519, 1 Am. Prob. R. 273, 282; *Guilfoyle's Will*, 96 Cal. 598, 601, 31 Pac. R. 553 (Code, § 14); *Upchurch v. Upchurch*, 16 B. Mon. (Ky., 1855), 102; *Higgins v. Carlton*, 28 Md. 115; *Smith v. Dolby*, 4 Harr. (Md.) 350; *Chase v. Kittredge*, 11 Allen (Mass.), 49, 58; *Nickerson v. Buck*, 12 Cush. (Mass.) 332, 343; *Willoughby v. Moulton*, 47 N. H. 205, 207; *Sheehan v. Kearney* (Miss.), 21 S. R. 41; *Thompson v. Thompson*, 49 Neb. 151, 160, 68 N. W. R. 372; *Campbell*

v. McGuigan (N. J.), 84 Atl. R. 383; *Chaffee v. Baptist Miss. Con.*, 10 Paige (N. Y.), 85, 89 (1843); *Worden v. Van Gieson*, 6 Dem. Sur. (N. Y.) 237; *Jackson v. Jackson*, 39 N. Y. (1868), 153, 160; *Butler v. Benson*, 1 Barb. (N. Y.) 526, 533; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144; *Plate's Estate*, 9 Pa. Co. Ct. R. 644; In *re Dockstader*, 6 Dem. Sur. 106; *Pool v. Buffum*, 3 Oreg. (1869), 438; *Cozzen's Will*, 61 Pa. St. 196; *Diehl v. Rodgers*, 169 Pa. St. 316, 324; *Wilbert's Estate*, 166 Pa. St. 113, 116; *Flannery's Will*, 24 Pa. St. 502; *Knox's Estate*, 131 Pa. St. (1889), 230, 231; *Asay v. Hoover*, 5 Pa. St. (1846), 26; *Sprague v. Luther*, 8 R. I. 252; *Paisley v. Snipes*, 2 Brev. (S. C., 1807), 200. See also *Overfield v. Overfield* (Ky.), 30 S. W. R. 994; *Mash v. Daniel* (Ala.), 18 S. R. 8; *Rosser v. Franklin*, 6 Gratt. (Va.) 1; *Jenkins' Will*, 43 Wis. 610. It is sufficient if the testator merely touch the pen, and the cross-mark is made for him by another person. In *re McGraw's Will*, 41 N. Y. Supp. 481; *Campbell v. McGuigan* (N. J.), 34 Atl. R. 363. See also note in 22 L. R. A. 370.

⁴ In *re Guilfoyle*, 96 Cal. 598, 601. A signature by mark, it has been

statute, it is necessary to prove, in a case where the testator has not actually written his name at the foot of the will, that he was unable to do so because of illiteracy, infirmity or illness. So in that state the making of the mark, or the writing of the name of the testator by another, at his request, must be proved by the oaths of two witnesses.¹

Some of the statutes require that the person who signs the testator's name or makes a mark for him shall also sign *his own name as an attesting witness*, and shall also state that he signed the name of the testator at the request of the latter.² But usually the name of the testator need not, unless it is required by statute, be attached to the mark;³ for the statute, says the court,⁴ does not require the will to be signed *in* the name of the testator, but *by the testator*. Hence if the wrong name is written in the body of the will, or is attached to the mark of the testator, it is not material, if it was actually signed at his request or by his direction.⁵

But the propriety and advisability of attaching the correct name of the marksman in every case to an instrument, whether a will or other writing, will suggest themselves to every sensible person. No presumption of law exists casting suspicion upon a will which is subscribed by mark. But when a will signed by a mark is offered for probate, the court has a right to know all the circumstances which attended its execution. It is material to know whether the testator was illiterate or could write, and if the latter, the court should know the reason for his not writing his name in the usual manner. A very high degree of proof would be required to negative any presumption of fraud and undue influence, where, though it appeared that the testator

repeatedly held, is a good and sufficient subscription to a will under a statute requiring all wills to be signed by the testator or by some one in his presence. *Thompson v. Thompson*, 49 Neb. 151, 160, 68 N. W. R. 372; and see cases cited in note 3, p. 254.

¹ *Greenough v. Greenough*, 11 Pa. St. (1849), 489; *Grabill v. Barr*, 5 Pa. St. 441.

² *Northcutt v. Northcutt*, 20 Mo. 266, 268; *McGee v. Porter*, 14 Mo. (1838),

611; *Simpson v. Simpson*, 27 Mo. (1847), 288; *Cornelius' Will* (1854), 14 Ark. 675; *In re Guilfoyle*, 96 Cal. 598, 601.

³ *Scott v. Hawks* (Iowa), 1898, 77 N. W. R. 467.

⁴ *In Bailey's Heirs v. Bailey's Ex'rs*, 35 Ala. 687, 691.

⁵ *Pool v. Buffum*, 3 Oreg. 438, 443; *Main v. Ryder*, 84 Pa. St. 217; *Long v. Zook*, 13 Pa. St. 400. Compare *Knox's Appeal*, 131 Pa. St. 220; *In re Clarke*, 27 L. J. Probate, 18, 4 Jur. (N. S.) 243, 1 Sw. & Tr. 22.

could write, his will was subscribed with a mark in place of his customary signature; and the proponent, who took substantial interests under the will, was instrumental in obtaining it, while other interested persons acted as witnesses to the signature. These circumstances do not make the will void, though they call for clear and satisfactory evidence to meet the burden of proof; and, if they are not satisfactorily explained, they may justify a conclusive presumption that the mark is not the subscription of the testator.¹

§ 188. **Guiding the hand of the testator.**—The Statute of Frauds permits the signature of the testator to be affixed to the will by another person for him at his request.² *A fortiori*, if the testator is so weak, by reason of physical exhaustion or the ravages of disease, that he is absolutely unable to guide the motion of the pen which he holds in his hand, and is physically unable to shape the words and letters composing his name, his hand may be guided by another person. It need not be shown that the testator had in words expressly requested the assistance involved in the guidance thus given, if it satisfactorily appear that he was conscious during the act of signing and while his hand was guided; for his submission and acquiescence in the actions of the person will be equivalent to a direction that his name shall be written for him. The direction to another to sign for the testator may be given by signs as well as by spoken language.³

§ 189. **The signature of the testator affixed by the hand of another.**—The English statutes of wills, as well as those of the several states which are modeled upon them, permit the

¹ *Donnelly v. Broughton* (1891), App. Cas. 435; *Stephens v. Stephens* (Mo.), 31 S. W. R. 792. It is always necessary, where a signature is by mark, to show that the testator was conscious when he made the mark, or when it was made for him, or when his name was signed to the will for him. If it shall appear that he was unconscious at that time, the signature is not valid, though he subsequently ratify it as his signature, unless he *also shall re-execute the will*. *Dunlop v. Dunlop*, 10 Watts (Pa.), 153.

² *Ante*, § 187.

³ *Stevens v. Van Cleve*, 4 Wash. C. (1822), 262. See, as sustaining same rule, *Fritz v. Turner*, 23 Atl. R. 125, 46 N. J. Eq. 515; *Van Hanswyck v. Wiese*, 44 Barb. (N. Y.) 494; *Vandruff v. Rinehart*, 29 Pa. St. 232; *In re Shotwell*, 3 Lack. J. 405, 11 Pa. Co. Ct. R. 444; *In re Dunn*, 14 Pa. Co. Ct. R. 584, 34 W. N. C. 166; *Trezevant v. Rains*, 85 Tex. 329, 19 S. W. R. 567 (construing Sayles' Code, art. 4859); *Wilson v. Beddard*, 12 Sim. 28. See also 23 L. R. A. 297 and 27 L. R. A. 370.

signature of the testator to the will to be written for him at his request by the hand of another. There must be evidence which will satisfy the court that the signature thus written was made at the request or by the direction of the testator; and that the latter intended that the party who signed for him should sign the instrument as his will. The instrument must be complete as a will without further signature. If, therefore, the name of the testator is written by another person at the end of the will, the testator intending to sign by a mark, which he neglects to do, the will is void, as it has neither been signed by nor for the testator in conformity with the statute. The majority of the statutes require that the act of signing by another person shall be performed in the presence of the testator "and at his express direction."¹

In construing these statutes it has been held that some request or direction to sign, conveyed either by words or by gestures, must be shown. The mere consciousness of the testator that another person is signing his name to a will in his presence, and his assent to, or silent acquiescence in, such action, is not sufficient. The testator must direct or request the other person to act for him either by word or gesture. And, if the direction has been given by motions or gestures, they must be as unambiguous as spoken language in expressing the desire of the testator.² Where the statute requires the signing to be by the express direction of the testator, it is not necessary that it shall be in words. One who is unable to speak may convey his meaning by gestures, but the meaning conveyed must be as clear and unambiguous as if in words. Hence, mere assent or acquiescence implied from looks, nods or ges-

¹ *Abraham v. Wilkins*, 17 Ark. 266; *Murray v. Hennessy* (Neb.), 67 (1856), 292; *Armstrong v. Armstrong*, N. W. R. 470; *In re Stevens' Will*, 6 29 Ala. (1857), 538, 541; *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. R. 1069. Dem. (N. Y.) Sur. 262, 3 N. Y. S. 131; *Vernon v. Kirk* (1858), 30 Pa. St. 218, 223; *Pool v. Buffum*, 3 Oreg. 438, 443; See also *ante*, §§ 187, 188.

² *Will of Cornelius* (1854), 14 Ark. 675; *Cochrane's Will*, 3 Bibb (Ky.), 491, 494; *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. R. 1069 (construing Gen. St. Minn. 1878, ch. 47, sec. 5); *Simpson v. Simpson* (1858), 27 Mo. 288; *Northcutt v. Northcutt*, 20 Mo. 266; *Ex parte Leonard*, 39 S. C. 518, 523, 18 S. E. R. 216. Compare *Walton v. Kendrick*, 122 Mo. 504, 525, 27 S. W. R. 872, as to a presumption that a will was signed at the direction of the testator.

tures, when a bystander suggests that some one sign for the testator, is not enough.¹

An impression of the name of the testator made with a stamp by a person who makes the impression *at the request of the testator*, and, *a fortiori*, if done by the testator himself, has been held a sufficient signing, where the implement employed to make the impression has been habitually used by the testator for the purpose of stamping his name upon letters and other writings requiring a signature.²

In some of the states the person who signs the name of the testator is required by statute to sign his own name as an attesting witness to the execution of the will, and in case he shall fail to do so the signing is ineffectual. Even where this is not required, it is always advisable that the signing of the name of the testator by another should be done by an attesting witness, or by some other disinterested person, that is, by some one who is not a beneficiary under the will.³ And in some of the cases it has been strongly hinted that the circumstance that the person who signed the name of the testator was a beneficiary under the will may call for a somewhat strict inquiry or cause comment, particularly where it also appears that there were others present at the execution of the will who might have performed this office for the testator. But if it shall satisfactorily appear that the person who signed the name of the testator acted under his direction or at his request, and in his presence, and that the testator was conscious of what was going on, no importance should be attached to the fact that such person benefits under the will.

The form of the signature is not material, provided it comprises the name of the testator as the same is usually signed by him. Thus, the person delegated by the testator to sign his name may sign his own name first, and following it that of the testator, as "A. B. for C. D.," the latter being the name of the testator.⁴ And his signature alone has been held good as equivalent to that of the testator himself, where, through a

¹ Waite v. Frisbie, 45 Minn. 361, 366.

² Jenkins v. Gaisford, 8 Sw. & T. 93, 33 L. J. Prob. 122.

³ Ex parte Leonard, 39 S. C. 518, 523; Herbert v. Berrier, 81 Ind. 1, 8

Am. Prob. R. 154, 156; Smith v. Harris, 1 Rob. 262; Robbins v. Coryell, 27 Barb. (N. Y.) 556.

⁴ Vernon v. Kirk, 30 Pa. St. 218.

misunderstanding of the legal requirements, he signed his own name, omitting that of the testator altogether.¹

§ 190. When the acknowledgment of the signature by the testator is sufficient.—Many of the local statutes prescribing the formalities requisite in the valid execution of a will provide that the will shall be subscribed by the testator in the presence of each of the witnesses, or, in the alternative, that the signature of the testator may be acknowledged by him to be his in the presence of each of the witnesses. Where such statutes operate, the witnesses need not see the testator sign the will, provided he shall, after having attached his signature to the will out of their presence, acknowledge the signature to be his in their presence; and, in some states, declare that the instrument which he has signed is his will. For the attestation which is referred to in the statutes is not an attestation of the *act* of signing or subscription. The witness is required to attest the signature and not the act of signing in order that he may identify the former at the probate; and if he is enabled to do this by reason of the subsequent acknowledgment of a signature previously written by the testator, the statutory requirements are sufficiently complied with.² As in the analo-

¹ In re Clark, 2 Curteis (1839), 329. See, also, In re Blair, 6 Notes Cas. 529, where the signature was as follows: "This will read and approved by Captain Blair, by C. C., in the presence of J. M., J. H. and C. C."

² Rogers v. Diamond, 18 Ark. (1853), 474, 487; Abraham v. Wilkins, 17 Ark. 292; Porter's Will, 20 D. C. 493; Hobart v. Hobart, 154 Ill. 610, 619; Yoe v. McCord, 74 Ill. (1874), 83; Dickie v. Carter, 42 Ill. (1867), 376; Turner v. Cook, 86 Ind. (1871), 129; Hobart v. Hobart, 154 Ill. 610, 614, 619 (1895); In re Convey, 52 Iowa (1879), 197, 199; Cochran's Will, 3 Bibb (6 Ky.), 491, 494; Shanks v. Christopher, 8 A. K. Marsh. (Ky., 1820), 144; Swift v. Wiley, 1 B. Mon. (Ky.) 114; Deake's Appeal, 80 Me. 50, 53, 12 Atl. R. 790; Dewey v. Dewey, 1 Met. (42 Mass., 1840), 349, 353; Nickerson v. Buck, 13 Cush. 332; Hogan v. Grosvenor, 10 Met. (51 Mass.)

54, 56; Tilden v. Tilden, 13 Gray (79 Mass., 1859), 110, 113; Ela v. Edwards, 16 Gray (Mass.), 92; Hall v. Hall, 17 Pick. (34 Mass.) 373, 379; Higgins v. Carlton, 28 Md. 115; Stirling v. Stirling, 21 Atl. R. 273, 64 Md. 138 (Act Md. 1798, ch. 101 subch. 1, sec. 4); Cravens v. Faulconer, 28 Mo. 19; Grimm v. Titman, 118 Mo. 57; Keyl v. Feuchter (Ohio, 1898), 47 N. E. R. 140; Walton v. Kendrick, 122 Mo. 504, 522; Compton v. Mitton, 12 N. J. L. 70, 73, 74; Mundy v. Mundy, 15 N. J. Eq. 290, 293; Stewart v. Stewart (N. J., 1898), 40 Atl. R. 438; In re Booth, 53 Hun, 629, 6 N. Y. Supp. 41; Jackson v. Jackson, 89 N. Y. 153, 161; Tucker v. Oxner, 12 Rich. (S. C.) L. 141, 143; Lewis v. Lewis, 11 N. Y. 220, 13 Barb. 17; Jauncey v. Thorne, 2 Barb. Ch. (N. Y.) 40; Peck v. Cary, 27 N. Y. 9; In re Austin's Will, 45 Hun, 1; Luper v. Wertz, 19 Oreg. 122, 23

gous requirement of the publication of the will at the time of its execution, no particular form of words is necessary as an acknowledgment that the signature to the will is that of the testator. A simple statement by him that the name signed to the paper is his, the signature itself being then shown to the witnesses with a request that they shall attest it, is sufficient. And where the publication of the will is required by the local statute, this acknowledgment of the signature ought to be supplemented by a further statement in the presence of the witnesses that the paper which they attest is the last will of the declarant.¹

The witness or witnesses to whom the acknowledgment is made must see the signature which is acknowledged. If the paper is folded in such a manner that neither witness is able to read the signature so as to be able to identify it subsequently at the probate, the ceremony is void as an acknowledgment.² For the main purpose of the attestation by witnesses is to furnish evidence by which the paper offered for probate may be identified as the identical instrument which was subscribed by the testator; and it is obvious if the witnesses attesting neither see the act of signing nor the signature after it is made, that this purpose is not and cannot be accomplished.³

Pac. R. 850 (Code, §§ 757, 3069); *Simmons v. Leonard*, 91 Tenn. 183, 186, 18 S. W. R. 280; *Rosser v. Franklin*, 6 Gratt. (Va.) 125; 4 Kent. 516; *Sturdivant v. Birchett*, 10 Gratt. (Va.) 67, 75; *Cook v. Parsons*, Prec. Ch. 185; *Stonehouse v. Evelyn*, 3 Peere Wms. 255; *Grayson v. Atkinson*, 2 Ves. (1752), 454; *Ellis v. Smith*, 1 Ves. Jr. 11, 16.

¹ *Dewey v. Dewey*, 1 Met. (Mass.) 349.

² The signature of the testator must be *seen* by the witnesses when they attest it. Attesting a paper which is so folded that one cannot see whether it is signed or not is not sufficient, though the testator declares to the witnesses that it is his will and that he has signed it. In *re Macky's Will*, 110 N. Y. 611, 18 N. E. R. 433; *Blake v. Blake*, L. R. (App. Cas.), 45 L. T.

R. (N. S.) 641, and note in *London Law Times*, May 20, 1882. The evidence of one subscribing witness that she did not think that the other saw the testator sign the will may be contradicted and overcome by the evidence of the draughtsman and a recital in the attestation clause that both witnesses saw the testator sign. *Farley v. Farley*, 50 N. J. Eq. 494, 26 Atl. R. 178.

³ *Baskin v. Baskin*, 36 N. Y. 416, 419; *Mitchell v. Mitchell*, 77 N. Y. 596; In *re Look*, 54 Hun, 635, 7 N. Y. Supp. 298 (2 R. S., p. 63, § 40); In *re Dale*, 56 Hun, 169, 9 N. Y. Supp. 396; In *re Landy*, 14 App. Div. 160, 43 N. Y. S. R. 689; In *re Eakins*, 18 Misc. R. 557. But in *Hobart v. Hobart*, 39 N. E. R. 581, 154 Ill. 610 (construing R. S. 1892, ch. 148, § 2), it was held that where the testator acknowledged the

§ 191. The necessity that the testator shall request the witnesses to attest.— In the absence of an express statutory provision requiring that the witnesses shall attest the will *at the request of the testator*, it is not necessary to prove that he requested them to do so.¹ The English Statute of Frauds did not require the testator to request the witnesses to attest his will. Nor does the more recent English statute,² which merely provides³ that the witnesses shall attest and shall subscribe the will in the presence of the testator. In many of the states the local statutes require in express terms that the attesting witnesses shall sign their names at the request of the testator.⁴

The purpose of these statutes is to prevent the officious intermeddling of bystanders in the execution of the will, and to prevent an officious signing of the will by persons as attesting witnesses who have not been chosen as such by the testator. He has a right to select such persons to witness the execution of his will as he can trust to perform that duty properly, and who, by reason of their prior acquaintance with him, are properly qualified to testify to his testamentary capacity, and the free and voluntary character of his actions in executing the will. The object of the statute is to discourage the attempts of all persons to force themselves as attesting witnesses upon the testator, and to confer full liberty of selection in this respect upon him. No particular form of language is necessary to constitute the request to the attesting witnesses. The request need not be made in express terms by the testator himself. It may be made for him by some person to whom he has delegated the right; for no particular form of words is essential to con-

will in the presence of a witness, it was not material that the witness did not actually see the signature of the testator. "The application of this principle does not depend upon the physical fact of signing; it applies all the same, whether the instrument was signed by the testator by his own hand, or by that of another at his request and in his presence; the acknowledgment has just the same probative force in the one case as in the other, and the removal of that probative force as to either mode by other proof that it was not signed

in one of these ways does not and cannot destroy the probative force of the acknowledgment that it was signed *in the other way*." *Walton v. Kendrick* (1894), 122 Mo. 504, 525.

¹ *Thompson v. Thompson* (Neb.), 68 N. W. R. 372; *In re Meurer*, 44 Wis. 392, 399 (1878).

² 1 Vict., c. 26.

³ See § 9.

⁴ *Rogers v. Diamond* (1858), 13 Ark. 474, 487; *In re McMulin*, 6 Dem. Sur. 347 (construing 2 R. S. N. Y., p. 68, sec. 40, subd. 4).

stitute such a request. The answer "yes" by the testator to a question put to him by the attorney or other person drawing the will, whether he wishes these persons who are present to witness his will, is a sufficient request to the witnesses as well as a due publication of the will.¹

It has been repeatedly held that if the draughtsman procures the attendance of the subscribing witnesses, and they, coming into the presence of the testator, see him sign a paper which he declares is his will, and he permits them, then and there, to subscribe their names to such paper as attesting witnesses, that his adoption and ratification of the requests made by the draughtsman obviate all necessity for proving that an express and oral request was made by the testator, or by some one else in his presence.² So, generally, the request may be made for the testator, at the time of the execution of the will, by the person superintending its execution or by any person who is present, and the testator may adopt the request as his own by a nod or gesture, or merely by silent acquiescence.³

¹ In *re Mullin's Estate*, 110 Cal. 252, 258; In *re Murphy's Estate*, 15 Misc. R. 208, 212; In *re Voorhis' Will*, 125 N. Y. 765, 767, 26 N. E. R. 935, affirming 7 N. Y. Supp. 596. An affirmative nod or gesture would doubtless have the same effect.

² *Peck v. Cary*, 85 Barb. (1861), 77, 27 N. Y. 9; *Gilman v. Gilman*, 88 N. Y. (1868), 364; *Huff v. Huff*, 41 Ga. 696, 703.

³ *Rogers v. Diamond*, 13 Ark. 474, 487; In *re Nelson's Will*, 62 Hun, (1894), 619, 16 N. Y. Supp. 690, 141 N. Y. 152, 157; In *re Kane's Will*, 20 N. Y. Supp. 123, 2 Con. Sur. 249; In *re Klett's Will*, 24 N. Y. Supp. 721, 722, 3 Misc. R. 385; *Peck v. Cary*, 27 N. Y. 9; *Gilbert v. Knox*, 52 N. Y. (1873), 128; In *re Woolsey's Will*, 41 N. Y. Supp. 263, 265, 17 Misc. R. 547; In *re Sarauw's Will*, 2 N. Y. Supp. 629; *Rutherford v. Rutherford*, 1 Denio (N. Y.), 83; *Skinner v. American Bible Society*, 92 Wis. 209, 213. Where one of the subscribing witnesses handed the testatrix the will, stating to her that he had come to

witness it, and she read the paper, declared it to be her will and signed it, after which the witnesses signed it, no request by words or gestures being proved, the execution was sufficient. *Hutchings v. Cochrane*, 2 Bradf. (N. Y.) 295. A request to sign, made to one of the witnesses only, but in the presence and hearing of the other, is a good request, for, under the circumstances, it may be justly presumed to have been intended for both. *Coffin v. Coffin*, 23 N. Y. (1861), 9. In the case of *Nelson's Will*, 141 N. Y. 152, 36 N. E. R. 3, where one of the subscribing witnesses denied the making of the request to sign, and the other, a lawyer and the partner of the testator, who was also a lawyer, was dead, and the attestation clause was silent as to the making of the request, the court, proceeding on the assumption that one of the witnesses and the testator being lawyers, held that a proper compliance with the requirement of the statute could be presumed.

§ 192. **The competency of a subscribing witness — He must be competent at the date of execution.**—The common law rejected absolutely the testimony of the parties to an action, and of all persons who were interested in the event or result of the action. The danger that a man who had a direct and actual pecuniary interest in the outcome of an action in a court of law would commit perjury, if called upon to testify as a witness in behalf of either party, was regarded as sufficient to justify excluding his testimony altogether. The English Statute of Frauds expressly required that a devise of freehold interests in lands to be valid should be attested by *credible* witnesses. Now it was early held by the courts, in construing this provision of the statute,—and is still the law applicable to similar statutory enactments,—that the word “*credible*,” as thus used, is synonymous with competent.¹ If, therefore, the witness was not competent according to the rules of the common law, he was not and is not credible under a statute which requires a credible witness, unless competency is expressly conferred upon him by some other statute. Applying the rule of the common law excluding the testimony of witnesses interested in the result of the proceeding in which they testify to the testimony of the subscribing witness, it was held that a subscribing witness to whom a devise was given in the will which he had been called upon to attest was not competent to prove the execution of the will. Hence a will attested by one or more legatees mentioned in it was void not only as to those clauses by which they were benefited, but as to the whole will; nor was it material how small or how contingent or remote the interest of the subscribing witness was, the result was the same.

Under a statute requiring an attesting witness to be credible, *i. e.*, competent, he must be competent according to the condition of affairs as they existed at the date of the execution of the will.² And if he was competent at the date of execution,

¹Noble's Estate, 22 Ill. App. 535; because of his conviction of forgery, Marsten's Appeal, 79 Md. 25, 45, 8 Atl. R. 885; Jones v. Larrabee, 47 Me. 474, 476; Hawes v. Humphrey, 9 Pick. (Mass.) 350; Haven v. Hilliard, 23 Pick. (Mass.) 10, 21; Warren v. Baxter, 48 Me. 193, 194. Where by statute a witness is not incompetent

he is competent and credible within the statute requiring credible witnesses. Robinson v. Savage, 124 Ill. 266, 15 N. E. R. 850.

²Fisher v. Spencer, 150 Ill. 253, 37 N. E. R. 314; Patten v. Tallman, 27 Me. 17, 29; Warren v. Baxter, 48 Me.

the fact that he subsequently became incompetent will not prevent his testimony from being received at the probate.¹ Thus, where the witness was competent when he attested, his competency is not destroyed by the fact that he is the probate judge or surrogate before whom the will is presented for probate.² Whether an incompetent witness, who is incompetent because he is an interested person under the will, can acquire competency by a release or assignment of his interest, the authorities are not wholly harmonious. In an early case³ it was decided that a legatee, having released his legacy, was competent to testify as a subscribing witness at the probate.⁴ The majority of the American cases seem strongly in favor of the same rule.⁵

§ 193. Competency of legatee as an attesting witness.—

The rule of law under which the courts held every devise invalid which if sustained would benefit an attesting witness resulted not only in an immense amount of litigation, but also in much inconvenience; for many wills were denied probate on account of that rule. To remedy the inconvenience, the statute 25 Geo. II., c. 6, was passed, which provided that if any person should attest the execution of a will or codicil to whom any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or personal estate, other than

193; *Hawes v. Humphrey*, 9 Pick. (26 Mass.) 350, 356; *Haven v. Hilliard*, 23 Pick. (40 Mass.) 10, 21; *Amory v. Fellows*, 5 Mass. 219; *Weems v. Weems*, 19 Md. 334; *Higgins v. Carlton*, 28 Md. (1867), 115; *Rucker v. Lambdin*, 12 Sm. & M. (20 Miss.) 230, 250; *Carlton v. Carlton*, 40 N. H. (1859), 14; *Stewart v. Harriman*, 50 N. H. (1875), 25, 1 Am. Pro. R. 95, 97; *Morton v. Ingram*, 11 Ired. Law (N. C.), 368; *Taylor v. Taylor*, 1 Rich. Law (S. C.), 531; *Kerns v. Soxman*, 16 Serg. & R. (Pa.) 315; *Search's Appeal*, 13 Pa. St. 108; *Smith v. Jones* (Vt.), 34 Atl. R. 424; *Brograve v. Winder*, 2 Ves. Jr. 634; *Wyndham v. Chetwynd*, 1 Burr. 414.

¹ *Sears v. Dillingham*, 12 Mass. 358; *Deakins v. Hollis*, 7 Gill & J. (Md.)

811; *Needham v. Borden* (Minn.), 57 N. W. R. 219.

² *Patten v. Tallman*, 27 Me. 17, 29; *Starr v. Starr*, 2 Root (Conn.), 332.

³ *Lowe v. Jolliffe*, 1 W. Bl. 365; *Goodtitle v. Welford*, Dougl. 139.

⁴ But *contra*, in *Brograve v. Winder*, 2 Ves. Jr. 636, and the opinion of Lord Camden in *Doe d. Hindsen v. Kersey*, 4 Burns' Ecc. Law, 27. See also *Fisher v. Spencer*, 150 Ill. 253, 37 N. E. R. 315.

⁵ *Deakins v. Hollis*, 7 Gill & J. (Md.) 811; *Weems v. Weems*, 19 Md. 334; *Shaffer v. Corbett*, 3 Harr. & J. (Md.) 513; *Kerns v. Soxman*, 16 S. & R. (Pa., 1827), 315, 317; *Cook v. Cook*, 16 S. & R. (Pa.) 198; *Search's Appeal*, 13 Pa. St. 108; *Nixon v. Armstrong*, 38 Tex. 296; and see cases cited in last note.

and except charges on lands, etc., for payment of debts, such devise, legacy, estate, interest, gift or appointment should, only so far as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person should be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such devise to him.

In nearly all of the states of the American Union, statutes having a precisely similar operation have been passed, a summary of which will be found in the notes. In those jurisdictions where such statutory provisions do not exist by legislative enactment, the statute Geo. II., c. 6, sec. 1, is in force as a part of the common law which our ancestors adopted as a constituent part of their jurisprudence upon their severance from the mother country by the Revolution.¹

§ 194. The place for the subscription of the witnesses.—In England it seems that, though the statute requires the witness to subscribe, he may affix his name to any part of the instrument. Thus, where a will was written and subscribed by the testator on the first side of a sheet of letter paper, folded down the middle, and the witnesses, after indorsing on the fourth side "Last Will and Testament," etc., signed their names, the subscription was held sufficient.² So a signing in a vacant space on the second sheet of a will written upon three sheets of paper has been held valid.³

In the United States the witnesses are usually required by statute to subscribe at the end. The names of the witnesses ought usually to follow immediately after the dispositive part of the will, or after the attestation clause if any is used. Whether a blank space intervening between the signatures of the witnesses and the will will overthrow the latter depends upon the circumstances of each case, particularly upon the length of the blank.⁴ But it has also been held that the sig-

¹ *Elliot v. Brant*, 6 Mackey (D. C.), 98.

² In the *Goods of Chamney*, 1 Robertson (1849), 757, 758.

³ *Roberts v. Phillips*, 4 Ellis & Bl. 450, 459, 24 L. J. Q. B. 171, 172.

⁴ *Soward v. Soward*, 1 Duvall (62 Ky.), 126, 132. In this case the will was, after execution, sealed up in the form of an envelope, and the witnesses signed their names on the outside of this sealed paper.

natures of the witnesses need not be immediately after the subscription of the testator.¹

§ 195. **The order of signing by the witnesses.**—According to the weight of the decisions, the witnesses ought to subscribe their names as witnesses *after* the testator has subscribed his; for, if the purpose of the attestation is to identify the signature of the testator, this purpose cannot be properly served if they shall precede him in signing. There can be no attestation until there is something to attest. And it has been held, though this is not the rule, that it is not material that the subscription of the testator and of the witnesses form parts of one and the same transaction.²

A presumption that the testator signed before the witnesses may arise from a proper attestation clause and from signatures in the usual place.³ But where the signature of the testator and those of the witnesses are attached to the will in such juxtaposition that no inference can be drawn as to which was written first,⁴ or where the witness admits that he did not see the signature of the testator on the paper when he signed it, and did not know whether it was there or not,⁵ it will be conclusively presumed that the testator did not sign before the witness, and the will is invalid. Elsewhere it has been held that the fact that the witnesses signed before the testator will not invalidate the will if they sign in his presence and he in theirs, *i. e.*, in other words, if the signing by both constitute parts of the one continuous transaction.⁶

¹ *Murray v. Murray*, 39 Miss. 214, 220. The statutory requirement that the witnesses shall subscribe is not met unless they sign their names at the end of the will. Whether a subscription by witnesses is valid depends, therefore, upon the determination of the question where is the end of the will. They need not necessarily subscribe after the attestation clause, for that is not a part of the will. See *ante*, § 184 et seq.

² *Duffie v. Corridon*, 40 Ga. 122; *Brooks v. Woodson*, 87 Ga. 379, 13 S. E. R. 712; *Reed v. Matson*, 27 Ind. 443.

³ *Allen v. Griffin*, 69 Wis. 529, 533, 35 N. W. R. 21.

⁴ *In re McMulkin*, 6 Dem. Sur. (N. Y.) 847.

⁵ *In re McDougall's Will*, 34 N. Y. Supp. 303, 87 Hun, 849; *In re Sarauw*, 2 N. Y. Supp. 629; *Simmons v. Leonard*, 91 Tenn. 183, 18 S. W. R. 280.

⁶ *Mundy v. Mundy*, 15 N. J. Eq. 290, 294; *Kaufman v. Caughman* (S. C.), 27 S. E. R. 16; *Jackson v. Jackson*, 39 N. Y. 153, 161; *O'Brien v. Gallagher*, 25 Conn. 229; *Rosser v. Franklin*, 6 Gratt. (Va.) 1; *Pollock v. Glassell*, 2 Gratt. (Va.) 439. So, too, in *Swift v. Wiley*, 1 B. Mon. (Ky.) 114, 117, where both witnesses subscribed before the testator, but at his request and in his presence, and remained with him

§ 196. The witnesses must attest "in the presence of the testator."—Many of the statutes regulating the execution of wills require that the witnesses shall subscribe their names "in the presence of the testator." The purpose and object of such statutory regulations are to enable the testator to see that the very persons whom he has requested to attest his will do in fact attest it, and also to prevent wicked and interested parties from substituting in the place of the paper which he has subscribed as his last will, another paper of which he knows nothing. Presence in its widest meaning is the antonym of absence. Hence where the statute requires a signing by witnesses in the presence of the testator, a subscription to a will by the witnesses in the absence of the testator is absolutely void. Nor can such a fatal defect be remedied by a subsequent acknowledgment by the witnesses of their signatures, uttered in the presence of the testator.¹ The requirement that the will shall be signed by the witnesses in the presence of the testator does not prescribe that he shall actually see the witnesses sign the will, provided they do in fact sign it in his presence. The validity of the execution of a will cannot be made to turn upon the ability of the testator to see; for, if such were the law, it is clear that no blind man could execute a valid will.² Therefore, while his intellect

until he signed, and then acknowledged their signatures in his presence, the execution was sufficient. See also *Olding's Case*, 7 Eng. Ecc. R. 341; *Byrd's Case*, 7 id. 394; *Cooper v. Bockett*, 7 id. 537.

¹ *Moore v. Spier*, 80 Ala. 129; *Brooks v. Duffell*, 23 Ga. 441 (1857); *Lamb v. Girtman*, 33 Ga. 289, 293, 295; *Edelen v. Hardey*, 7 Har. & J. (Md., 1826), 61, 67; *Russel v. Falls*, 3 Har. & J. (Md., 1814), 457; *Boldry v. Parris*, 2 Cush. (Mass.) 433, 437; *Mendell v. Dunbar*, 169 Mass. 74, 75, 47 N. E. R. 402; *Elliott v. Welpy*, 13 Mo. App. 19; *Jones v. Tuck*, 5 Jones L. (N. C.) 202; *Sprague v. Luther*, 8 R. I. 252; *Pawtucket v. Ballou*, 15 R. I. 58, 60, 23 Atl. R. 43; *Moore v. Moore*, 8 Gratt. (Va.) 307; *O'Hagan's Will*, 73 Wis. 78; *Eccleston v. Speke*, Carth. (1639), 81; *Hoil v. Clark*, 3 Mod. 219, 220; *Lee v. Libb*,

Shaw, 69; *Dormer v. Thurland*, 3 Peere Williams, 510; *Onions v. Tyrer*, 1 id. 844; *Ellis v. Smith*, 1 Ves. Jr. 10. But see, *contra*, *Sturdivant v. Birchett*, 10 Gratt. (Va.) 67, in which it was held that the signature was sufficient where the witnesses, after signing their names out of the presence of the testator, took the will into the room where he was and delivered it to him, at the same time pointing out to him the signatures they had written upon the paper near his own name. See also *Broderick v. Broderick*, 1 P. Williams, 239. In a recent case in Pennsylvania it has been held that witnesses need not attest in the presence of the testator. *Kirby's Estate*, 9 Kulp, 345.

² *Riggs v. Riggs*, 135 Mass. 238, 241; *Maynard v. Vinton*, 59 Mich. 139; *Campbell v. McGuiggan* (N. J., 1898).

and hearing remain unimpaired, and he is conscious of what is going on about him, an attestation in the same room where he is, or in such close proximity in another room as to be in the testator's line of vision, provided he could see, and within his hearing, will be a sufficient signing in his presence.¹

In order that a signing shall be in the presence of the testator in the statutory sense of the word, he must be mentally conscious of what is going on about him. He must have the power to recognize the acts of the witness; if not by sight, then by and through the avenue of some other sense. Hence an attestation in the room where he lies, after having relapsed into a condition of *coma*, is invalid, for he not only does not *see*, but he can neither *see* nor *hear* what is being done.

If the testator is able to see the attestation by the witnesses, it is not material to prove that in fact he did not see it. But he must be able to see the witnesses subscribe the will; or, to define the rule of law more clearly, their relative position to him at the time that they are subscribing their names as witnesses, whether they are in the same room with him or not, must be such that he may see them if he thinks proper to do so. He must have power thus to satisfy himself by ocular evidence that they are witnessing the very paper which he intends to be his will. For the purpose of the law is not so much to secure a signing of the names of the witnesses in the actual view of the testator as to afford him an opportunity to detect and to prevent the substitution of another will in the place of that which he has signed. If, therefore, he has so much confidence in the witnesses that he elects not to watch their actions, the law will not permit this confidence to destroy his will. It is generally sufficient if he might have seen them attest had he so desired. It need not be proved that he did see them in the act of signing, for this would make the legality of execution depend upon the testator turning his head, or opening or closing his eyes, while this act is taking place.² The question whether an at-

84 Atl. R. 888; Weir v. Fitzgerald, 2 Piercy, 1 Rob. 278, 4 Notes Cas. 250, Bradf. (N. Y.) 42, 68; Reynolds v. 253.

Reynolds, 1 Spears (S. C.), 253, 257;

Ray v. Hill, 3 Strobb. (S. C.) L. 297;

Doe v. Manifold, 1 M. & S. 294; Todd

v. Winchelsea, 2 C. & P. 488; In re

¹Riggs v. Riggs, 185 Mass. 238.

²Hill v. Barge, 12 Ala. 687, 696; Rob-

inson v. King, 6 Ga. 539; Lamb v.

Girtman, 26 Ga. 629, 33 Ga. 299;

testation by witnesses not in the same room as the testator is valid has been much litigated. The fact that the witnesses were in the room with the testator when they signed their names is a circumstance which may, if he was conscious and in such a position that he may have seen the act of attestation, create a conclusive presumption that it was in his presence.¹ But, on the other hand, though the witnesses may subscribe their names in the same room with the testator, there may be such a physical barrier or obstruction interposed between them and him that he cannot possibly see what they are doing; and, under such circumstances, it cannot be said that the signing is in the presence of the testator within the meaning of the words as they are employed in the statute.² But the circumstance that the attestation was had in another room is not sufficient to render it invalid if the testator had it in his power to see what was being done.

Thus, a signing by the witnesses in a room adjacent to that in which the testator was lying, the door between the two rooms being open, and it being possible for the testator to see the witnesses if he desired to, was held to be a good attestation though it did not affirmatively appear that he had seen them sign.³

Ambre v. Weishaar, 74 Ill. 109, 114; *Drury v. Connell* (Ill., 1898), 52 N. E. R. 368; *Green v. Green*, 145 Ill. 264, 278, 33 N. E. R. 941; *McElfresh v. Guard*, 32 Ind. 412; *Howard's Will*, 5 T. B. Mon. (Ky.) 199, 203; *Edelen v. Hardey*, 7 Harr. & J. (Md.) 61, 67; *Boldry v. Parris*, 2 Cush. (Mass.) 433, 437; *Ayers v. Ayers*, 43 N. J. Eq. 565, 570, 12 Atl. R. 621; *Compton v. Mitton*, 12 N. J. L. 70, 75; *Aikin v. Weckerly*, 19 Mich. 482, 504; *Maynard v. Vinton*, 59 Mich. 139, 149; *Cravens v. Faulconer*, 38 Mo. 19, 21; *Graham v. Graham*, 10 Ired. (N. C.) Law, 219, 220, 221; *Wright v. Lewis*, 5 Rich. (S.C.) L. 212, 216; *Baldwin v. Baldwin*, 81 Va. 410, 414; *Neil v. Neil*, 1 Leigh (Va.) 6; *In re O'Hagan*, 73 Wis. 78, 81; *In re Downie*, 42 Wis. 66, 75; *Watson v. Pipes*, 32 Miss. 451, 468; *Hindmarsh v. Charlton*, 8 H. L. C. 160.

¹*Stewart v. Stewart* (N. J., 1898), 40 Atl. R. 438.

²*Hill v. Barge*, 12 Ala. 687, 696.

³*Gallagher v. Kilkeary*, 29 Ill. App. 415; *Ambre v. Weishaar*, 74 Ill. 109, 114; *Orndorff v. Hummer*, 12 B. Mon. (Ky.) 619; *Howard's Will*, 5 T. B. Mon. (Ky.) 199, 203; *Davy v. Smith*, 3 Salk. 395; *Shires v. Glascock*, 1 Atk. 688; *Casson v. Dade*, 1 Bro. C. C. 99; *In re Piercey*, 4 Notes Cas. 250, 253. An attestation in the room where the testator is lying on a bed in such a position that he could easily see the witnesses by turning his head, which he was able to do, is sufficient, though it does not appear that he did turn his head or see them. *Walker v. Walker*, 67 Miss. 529, 7 S. R. 481. An attestation is not in the presence of the testator, though it is in the room where he is, if he has his back to the

If it is physically impossible that the testator, lying or sitting in one room, can, in the position in which he is, see what is going on in the room where the will is attested, an attestation in another room is void.¹

Thus, where it appears that, after the signing of the will by the testator, the witnesses withdrew to another room in the same house, no part of which room was visible from any part of the room in which the testator remained, and there they subscribed as witnesses, it was held that the will was not signed by the witnesses in the presence of the testator.²

witnesses and is unable to change his position without assistance, which he declines to procure. *Tribe v. Tribe*, 1 Rob. 775, 13 Jur. 793.

¹ *Doe v. Manifold*, 1 Maule & Sel. 294; *Mendell v. Dunbar*, 169 Mass. 74, 75, 47 N. E. R. 402; *Boldry v. Parris*, 2 Cush. (Mass.) 433, 437; *Graham v. Graham*, 10 Ired. (N. C.) L. 219, 221; *Witt v. Gardner*, 41 N. E. R. 781, 158 Ill. 176; *Reynolds v. Reynolds*, 1 Spears (S. C.), 256. "In favor of attestation it is presumed that if the testator might see he did see; but I am afraid that, if we get beyond the rule which requires that the witnesses should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the deviser's presence, as to which the rule is, that where the deviser cannot by possibility see the act doing that it is out of his presence." Remarks of Lord Ellenborough in *Doe v. Manifold*, *supra*.

² *Mendell v. Dunbar*, 169 Mass. 74, 75. "The object of the statute is to protect the testator against the fraud of parties . . . substituting one writing for another; and so astute have some courts been in construing the statute to prevent frauds upon the testator that they have perpetrated the most glaring frauds upon him by defeating his will, simply because the foot-board of the bed was too high for the testator to see the witnesses sign their names at a table

standing at the foot of the bed (*Newton v. Clarke*, 2 Curt. 320), or because, though the witnesses were in plain sight of the testator, yet, when they signed, their backs were towards him." *Maynard v. Vinton*, 59 Mich. (1886), 139, 149. "The condition and position of the testator when his will is attested, and in reference to the act of signing by the witnesses, and their locality when signing, must be such that he has knowledge of what is going forward, and is mentally observant of the specific act in progress; and unless he is blind, the signing by the witness must occur where the testator, as he is circumstanced, may see them sign if he choose to do so. If, in this state of things, some change in the testator's position is requisite to bring the action of the witnesses within the scope of his vision, and such movement is not prevented by his physical infirmity, but is caused by an indisposition or indifference on his part to take visual notice of the proceeding, it is to be considered as done in his presence. If, however, the testator's ability to see the witnesses subscribe is dependent upon his ability to make the requisite movement, then, if his ailment so operate upon him as to prevent this movement, and on this account he does not see the witnesses subscribe, the will is not witnessed in his presence." *Aikin v. Weckerby*, 19 Mich. (1870), 492, 504.

In some instances the courts have gone beyond the rule that if the act of signing *cannot possibly be seen by the testator* it cannot be regarded as having been in his presence. In one case it was held that, though the witnesses attested in a room adjoining that in which the testator was lying and where it was an absolute physical impossibility that he should see them, yet the attestation was valid where it appeared that it was done at his request, and that after signing by the witnesses he was informed by them that they had signed and he was shown the witnesses' signatures and the will was again read to him.¹

§ 197. **The attesting witnesses need not sign in the presence of each other.**—Under the Statute of Frauds, and under those statutory enactments in the several states which are modeled upon it, by which an acknowledgment in the presence of witnesses is sufficient, it has been generally held that the witnesses need not sign the will *in the presence of one another, if all sign in the presence of the testator*. It has been pointed out that the testator need not sign in the presence of either of the attesting witnesses, provided that he shall, after having attached his signature out of their presence, acknowledge it to be his signature in the presence of each of them. The courts have construed the statutes to permit a signing in the presence of one witness and an acknowledgment in the presence of another, or an acknowledgment made in the presence of each witness separately, to be a sufficient compliance with the statute. As the witness must, if he sign as an attesting witness, do so at the precise time that the testator acknowledges his signature, and also, to satisfy the statute, *in his presence*, it follows of necessity that it cannot be required that the witnesses shall sign in the presence of each other.² But the English probate courts, construing the modern statute of Wills, 1 Vict. 26, sec. 9,

¹ Cook v. Winchester, 81 Mich. 581, Blanchard v. Blanchard, 32 Vt. 62; 46 N. W. R. 106. See also, Article by Parramore v. Taylor, 11 Gratt. (Va., 1854), 220; Dudleys v. Dudleys, 3 Mr. Schouler, 26 Am. Law R. 858.

² Hoffman v. Hoffman, 26 Ala. (1855), 536; Flinn v. Owens, 58 Ill. 111 (1871); Porter's Will, 20 D. C. 493 (under statute of Maryland); Dewey v. Dewey, 1 Met. (42 Mass.) 849, 353; Hogan v. Grosvenor, 10 Met. (51 Mass.) 54, 56; Simmons v. Leonard, 91 Tenn. 183, 186, 18 S. W. R. 280; Leigh (Va., 1833), 496; Casement v. Fulton, 5 Moore P. C. 130; Will of Smith, 52 Wis. 543, 547 (construing Wis. R. S., § 2282); In re Deake, 80 Me. 50, 53, 12 Atl. R. 790; Appeal of Lane, 57 Conn. 182, 17 Atl. R. 926 (construing Gen. Stat. 1888, § 588, and Gen. Stat. 1875, p. 369, § 2).

which requires an actual signing or subscription in the presence of the witness, demand that they shall be together in the presence of the testator when he subscribes, and hold that a signing in the presence of one witness with an acknowledgment in the presence of another is an invalid execution, whether a day or only a few minutes intervene between the attestation of the several witnesses.¹ The attesting witnesses need not be present together when the testator *acknowledges his signature*. The testator may sign the will at a time when no witness is present, and he may then subsequently acknowledge the signature thus made in the presence of each witness separately;² nor need they sign in the presence of each other.

§ 198. **The signature of the witnesses by mark.**—The persons who are called upon by the testator to act as attesting witnesses to his will, in view of the important and delicate duties which they are to perform in determining his testamentary capacity, ought to possess some degree of intelligence and education. Such persons are usually selected. Nevertheless the testator may select illiterate persons, for it is well settled that the attesting witness may sign his name to the will by a mark, and that such a signature is as valid as one written in full by him.³

¹ Wyatt v. Berry, L. R. Prob. D. (1892), 5, 9; Moore v. King, 3 Curt. 243; Hindmarsh v. Charlton, 8 H. L. Cases, 100.

² Grubbs v. Marshall (Ky.), 13 S. W. R. 447 (Gen. Stat. Ky., ch. 113, sec. 5, requires the will to "be acknowledged in the presence of at least two credible witnesses"); Rogers v. Diamond, 13 Ark. 474, 487; Payne v. Payne, 54 Ark. 514, 16 S. W. R. 1; In re Potter's Will, 12 N. Y. Supp. 105; Hoysradt v. Kingman, 22 N. Y. (1861), 372; Willis v. Mott, 36 N. Y. (1867), 486, 497; Lyman v. Phillips, 8 Dem. Sur. (N. Y.) 459, 467; Tucker v. Oxner, 12 Rich. (S. C., 1860), L. 141, 143; Sturdivant v. Birchett, 10 Gratt. (Va.) 67, 75; Westbeach v. Kennedy, 1 Ves. & B. 362; Smith v. Codron, 2 Ves. 455; Stonehouse v. Evelyn, 3 P. Wms. 253, 255; Grayson v. Atkinson, 2 Ves. 454; White v. Trustees, 6 Bing. 310.

³ Bailey v. Bailey, 35 Ala. (1860), 687; Garrett v. Heflin (Ala.), 13 S. R. 326; Davis v. Semmes, 51 Ark. 48, 50, 9 S. W. R. 434; Horton v. Johnson, 18 Ga. (1855), 397; Thompson v. Davitte, 59 Ga. 472, 482; Gillis v. Gillis, 96 Ga. 1, 5; Montgomery v. Perkins, 2 Met. (59 Ky.) 448, 74 Am. Dec. 419; Chase v. Kittredge, 11 Allen (Mass.), 49; Allen v. Mass, 27 Mo. 354, 363; Compton v. Mitton, 12 N. J. L. 70; Morris v. Kniffen, 37 Barb. (N. Y., 1861), 336; Lord v. Lord, 58 N. H. (1879), 7, 10, 42 Am. R. 465; Prigden v. Prigden, 13 Ired. (35 N. C., 1851), Law, 259, 260; Carrier v. Hampton, 11 Ired. (33 N. C.) Law, 307, 310; Jackson v. Jackson, 39 N. Y. 153; McFarlane v. Bush, 94 Tenn. 538; Ford v. Ford, 7 Humph. (Tenn.) 92, 97; 4 Kent, 575; 10 Bac. Abr. 491; Williams, Ex'rs, 79; Harrison v. Harrison, 8 Ves. 185; Addy v. Grix, 8 id. 504; Doe d. Davies v.

It is the better practice, where the witness attaches a mark, for his name to be written opposite the mark by some other person for him. Some of the cases hold that the signature of a witness by mark is only valid when this is done. Such would seem to be a reasonable construction of a statute which requires "that the witness shall *sign his name as a witness at the end of the will.*" Whether a signing of the name or of the mark of the witness by another person at his request and in his presence, the witness neither touching the pen nor the hand of the person who does the writing, is a sufficient compliance with the statute which requires a witness to sign his name at the end of the will, has been much doubted. Some of the cases hold that such an attestation is wholly invalid.¹

In many other cases it has been held that the name of the witness may be written for him by another if done *at his request*, he standing by, but making no manual motions on his part in connection with the act of signing; for the validity of the attestation depends upon the attaching of the name of the witness, not upon anything he may do or any action he may take. The maxim *Qui facit per alium facit per se* applies to the case.² If, however, the attesting witness, being unable to write, makes no mark whatever upon the paper, the proponent of the will should be required to prove satisfactorily that the request to another to sign was made, that the signing was in

Davies, 9 Adol. & EL 648. "The witnesses should always be persons of intelligence, incorruptibility and good memory; one of them at least preferably a business friend of the testator." Editorial on "Attesting Witnesses to Wills," 8 N. Y. Law Journal, p. 400. See *ante*, § 187, as to the signature of the testator by mark.

¹Horton v. Johnson, 18 Ga. 396 (1855); Bush v. McFarland, 29 S. W. R. 899, 94 Tenn. 538, 540; Simmons v. Leonard, 91 Tenn. 183, 185, 18 S. W. R. 280.

²Upchurch v. Upchurch, 16 B. Mon. (55 Ky.) 102, 113; Montgomery v. Perkins, 2 Met. (59 Ky.) 448; Chase v. Kittredge, 11 Allen (93 Mass., 1865), 49, 59; Lord v. Lord, 59 N. H. 7, 10;

In re Strong, 16 N. Y. Supp. 104, 105; Jesse v. Parker, 6 Gratt. (Va.) 57, 52 Am. Dec. 102; In the Goods of White, 2 Notes Cas. 461; In re Crawford's Will (S. C.), 24 S. E. R. 69; In re Losee's Will, 18 Misc. R. 298, 34 N. Y. Supp. 1120. In Simmons v. Leonard, 91 Tenn. 183, 18 S. W. Rep. 280, it was held that where the signature of an attesting witness, who was unable to write, was written for him by a third person at the request of the witness, the attestation was ineffective where the person who wrote the signature of the witness was the principal beneficiary, and hence incompetent as a witness in his own name.

response to such request, and that the witness actually attested the execution of the will.¹ Not only a mark with the name of the witness attached, but anything that the witness shall write with an intention that it shall stand for his name, will constitute a valid signing by him. The initials of the witness, placed after the signature of the testator, will be presumed to have been so placed with an intention to attest the will.²

The person who writes the name of the witness at his request ought to write his own name as well. But his failure to do so will not invalidate the attestation,³ for the statute does not signify that the evidence of the person who writes in the name of the marksman shall be the only evidence of the signature of the witness. The attesting witness must be produced, whether or not some other person has signed his name for him, or his absence must be properly accounted for.⁴

While a signature by mark is always valid, the witness, or some one for him and at his request, must make *some mark* upon the paper which the witness *intends to stand for his name*.⁵ Thus, where the witness, by inadvertence, signed the name of the testator and not his own at the foot of the attestation clause, it was held not a valid subscription.⁶

There need be no peculiarity or individuality in the mark, if the witness shall be able to swear he made it. No crest or picture is required to be affixed. One who signs by mark may have a peculiar ability of his own to distinguish an ordinary mark made by him from numerous others seemingly similar. And if the witness does not need any peculiarity in his mark to recognize it the court cannot require it. If he can testify that, in his opinion, he made the mark, and can identify the will as having been attested by him, it is sufficient, though he states he cannot swear positively that he made the mark.⁷

§ 199. **Minors as attesting witnesses.**—A minor may, in the absence of a prohibitory statute, act as an attesting witness, though it is necessary that he shall have the requisite

¹ Chase v. Kittredge, 11 Allen (Mass.), 49. See remarks of Judge Gray in this case on page 59.

² In re Christian, 2 Rob. 110; Adams v. Chaplin, 1 Hill (S. C.), Eq. 264, 266.

³ Davis v. Semmes, 51 Ark. 48, 51, 9 S. W. R. 434.

⁴ Ex parte Miller, 49 Ark. (1887), 18.

⁵ McFarland v. Bush, 94 Tenn. 538-541.

⁶ In re Walker's Estate, 110 Cal. 387, 42 Pac. R. 815.

⁷ Thompson v. Davitte, 59 Ga. 472, 484.

capacity and intelligence at the time of execution to be able to testify to a proper compliance with the statutory formalities and to the testamentary capacity of the testator. As in other cases where the competency of young children as witnesses is concerned, no arbitrary and unyielding rule can be stated which will serve as an invariable test of competency. It is hardly safe to employ very young persons as attesting witnesses, and, where it was unavoidable, and an infant under fourteen years was employed, the burden of proof to show his competency was cast upon the proponent of the will.¹

§ 200. **The omission of a formal attestation clause.**— No clause of attestation is required by any of the statutes. The fulfillment of the statutory requirements is all that is necessary, and this may be proved without any recital of the fact in the will, or in an attestation clause attached to the will, if any shall be added. Hence, the complete omission of an attestation clause has no effect upon the validity of the will except collaterally, to the extent that the attestation clause may supply proof of proper execution in case a witness shall prove hostile or forgetful of essential facts.²

No form of words is necessary to constitute an attestation clause. The word "attest,"³ or "witness,"⁴ or some similar expression, not fully stating a compliance with all the statutory requirements, will answer the purpose.⁵

¹ *Jones v. Tebbetts*, 57 Me. 574; *Carlton v. Carlton*, 40 N. H. 14, 19.

² *Robinson v. Brewster*, 140 Ill. 648, 30 N. E. R. 683; *In re Deakes' Will*, 80 Me. 50, 53 (1888), 12 Atl. R. 790; *Ela v. Edwards*, 16 Gray (Mass.), 91, 99; *Berberet v. Berberet*, 131 Mo. 399, 409, 33 S. W. R. 61; *In re Look's Will*, 1 Con. (N. Y.) Sur. 403, 5 N. Y. Supp. 50, 52; *In re Lewis' Will*, 51 Wis. (1881), 101, 103; *Leaycraft v. Simmons*, 3 Bradf. (N. Y.) 85.

³ *Fry's Will*, 2 R. L. 88; *Potts v. Felton*, 70 Ind. 166; *Robinson v. Brewster*, 140 Ill. 648.

⁴ *Olerick v. Ross*, 146 Ind. 282, 45 N. E. R. 192.

⁵ *Osborn v. Cook*, 11 Cush. (65 Mass.) 532; *Chase v. Kittredge*, 11 Allen (98

Mass., 1866), 49; *Fatheres v. Lawrence*, 33 Miss. (1837), 585; *In Goods of Streatley* (1891), Prob. 172; *In re Klett*, 24 N. Y. Supp. 721, 722; *Leaycraft v. Simmons*, 3 Bradf. (N. Y.) 35; *Herbert v. Berrier*, 81 Ind. 1 (1882); *Waddington v. Buzby*, 45 N. J. Eq. 173, 16 Atl. Rep. 690; *Chaffee v. Baptist Miss. Conv.*, 10 Paige (N. Y., 1843), 85, 40 Am. Dec. 255; *Jackson v. Jackson*, 39 N. Y. (1868), 153, 159; *Jackson v. Christman*, 4 Wend. (N. Y.) 277, 282; *Roberts v. Phillips* (1855), 4 El. & Bl. 450, 453, 24 L. J. Q. B. 171; *Bryan v. White*, 5 E. L. & Eq. 579; *Brice v. Smith*, Willes, 1; *Croft v. Pawlett*, 2 Strange, 1109; *Burdett v. Spilsbury*, 6 M. & G. 386, 10 Cl. & Fin. 340.

§ 201. The value and admissibility as evidence of a perfect and formal attestation clause where the attesting witnesses are absent, hostile or forgetful.— Though a full and formal attestation clause showing that the statutory requirements have been met may be dispensed with without affecting the validity of the will, the insertion of such a clause is always advisable. If properly framed, it ought to show clearly and in reasonable detail a compliance with all the statutory formalities which are required to constitute a valid execution. The attestation clause should be read at the execution of the will in the presence and hearing of the testator and of the witnesses. And perhaps a better mode of securing a strict compliance with all statutory formalities would be to embody the substance of a full and complete attestation clause in questions addressed in turn to the testator and to the witnesses by the draughtsman, securing explicit replies to them, the clause itself serving both before and during the execution as a memorandum of what acts are to be performed by the respective parties; and, after execution, as an accurate record of what they have done.

For under some circumstances a perfect attestation clause may be of great value and use as proof that all the requirements of the law were complied with. Such circumstances exist not only when the witnesses have died after the execution of the will, and when they are out of the jurisdiction of the court and cannot, for that reason, be produced at the probate, but also when, being present at the probate, they unexpectedly prove hostile, or where, from lapse of time or otherwise, they have forgotten some essential fact attending execution. Where one or more of the witnesses are absent, the will may be admitted to probate upon the presumption of regularity arising from a perfect and formal attestation clause which recites that all statutory requirements were complied with, supplemented by proof of the handwriting of the testator and of that of the absent witnesses. So, when the subscribing witnesses are present at the probate and admit the genuineness of their signatures, but deny or are unable to recollect some or all of the facts which were attendant upon the execution, so that one or both of them are unable or unwilling to testify with positiveness and of their own knowledge that all the requirements of the statute were complied with, a presumption of due and proper

execution will arise from the recitals of a perfect attestation clause, which becomes conclusive in the absence of satisfactory proof to the contrary.¹ The deposition of a subscribing witness made before the surrogate must be considered as a part of the evidence upon an appeal from his decision. A strong presumption of due execution arises from such a deposition when coupled with a formal and perfect clause of attestation.²

¹*Sutton v. Sutton*, 5 Harr. (Del., 1850), 459; *Barnes v. Barnes*, 66 Me. 286, 296; *Ela v. Edwards*, 16 Gray (Mass.), 91, 99; *Abbott v. Abbott*, 41 Mich. 540; *Layer v. Smith*, 8 Mich. (1860), 459; *Alspaugh's Will*, 23 N. J. Eq. 507, 508; *Mundy v. Mundy*, 15 N. J. Eq. 290, 293; *Tappen v. Davidson*, 27 N. J. Eq. (1876), 459, 460; *McCurdy v. Neall*, 42 N. J. Eq. (1887), 333, 335, 7 Atl. R. 566; *Kirkpatrick's Will*, 23 N. J. Eq. 463, 464; *Farley v. Farley*, 50 N. J. Eq. 434, 439, 26 Atl. R. 178; *Brinckerhoff v. Remson*, 26 Wend. (N. Y.) 325, 338, 339; *In re Johnson*, 27 N. Y. Supp. 649, 650, 7 Misc. R. 220; *In re Bernsee*, 71 Hun, 27, 29, 24 N. Y. Supp. 504, 141 N. Y. 389, 392; *In re Schweigert's Will*, 40 N. Y. Supp. 979, 983, 17 Misc. R. 186; *Kellum's Will*, 52 N. Y. 517; *Peck v. Cary*, 27 N. Y. 9, 27; *Butler v. Benson*, 1 Barb. (N. Y.) 527; *Townley's Will*, 1 Con. Sur. (N. Y.) 400, 4 N. Y. Supp. 455; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Brown v. Clark*, 77 N. Y. 369; *In re Wilcox's Will*, 14 N. Y. Supp. 109; *In re Merriam's Will*, 16 N. Y. Supp. 738, 62 Hun, 621; *In re Nelson*, 141 N. Y. 152, 157, 16 N. Y. S. 690; *Rugg v. Rugg*, 88 N. Y. (1880), 592, 594; *In re Pepoon's Will*, 91 N. Y. (1883), 255, 258, 259; *In re Cottrell's Will*, 95 N. Y. (1884), 830, 835; *Lane v. Lane*, 95 N. Y. 494, 500; *Wright v. Sanderson*, 50 L. T. R. (N. S.) 769; *In re Brock*, 37 S. C. 348, 16 S. E. R. 38; *Meurer's Will*, 44 Wis. 392, 399.

²*Farley v. Farley*, 50 N. J. Eq. 434, 26 Atl. R. 178. See the case of *Brisell's Will*, 45 N. Y. Supp. 122, where

one subscribing witness was dead and the other forgetful of everything that had happened at the execution. "An attestation clause showing upon its face that all the forms required by the statute have been complied with is not absolutely necessary to the validity of a will, as the witness will be permitted to prove that the forms were in fact complied with, although the attestation clause is silent upon the subject. Indeed, it has been decided that a formality of this kind, not noticed in the attestation clause, may even be presumed from circumstances, after the witnesses to the will are dead. . . . The statute does not require an attestation clause showing that the proper legal formalities were complied with; and although upon the face of the instrument those formalities are stated to have taken place, the fact may be disproved by the witnesses. But prudence requires that a proper attestation clause should be drawn, showing that all the statute formalities were complied with; not only as presumptive evidence of the fact in case of the death of the witnesses, or where from lapse of time they cannot recollect what did take place, but also for the purpose of showing that the person who prepared the will knew what the requisite formalities were, and therefore gave the proper information to the testator, or saw that they were complied with if he was present. To impress the more strongly upon the memory of the witnesses the important fact

§ 202. **The necessity for the publication of the will by the testator at the time of its execution.**—In a case which was determined in England in 1744, long after the passage of the Statute of Frauds, it was held by the lord chancellor that a publication of the will by the testator at the time of the execution in the presence of a witness could not be dispensed with.¹ The statute itself is silent on this point. Subsequently the English courts denied the authority of this case, and enunciated a different rule, under which the publication of the will, meaning some statement made by or for the testator that the instrument he signed *was his last will*, was not necessary and might be dispensed with.²

that all the legal forms requisite to a due execution of the will were complied with at the time when they subscribed their name as witnesses to such execution, the safer course is to read over the whole of the attestation clause in the presence and hearing of the witnesses and the testator. And where the person executing the will is not known to the subscribing witnesses to be capable of reading and writing, as where he executes the will as a marksman, it would be proper that the whole will should be deliberately read over to him, in the presence and hearing of the witnesses, and the fact of such reading in his presence should be stated in the attestation clause. Or at least the witnesses ought, by inquiries of the illiterate testator himself, to ascertain the fact that he was fully apprised of the contents of the instrument which he executed and published as his will, as well as that he was of competent understanding to make a testamentary disposition of his property. All these things are matters of prudence and precaution to prevent any well-founded doubt upon matters of fact; and where they are neglected it does not necessarily render the will invalid, if the court or jury which is to pass upon the question of its validity is sat-

isfied, upon the whole evidence, that it was duly executed, and that the testator understood its contents. The legislature has seen proper to prescribe certain legal requisites to the due execution of a will; all of which must be substantially complied with, or the will is void in law. And the *onus* of satisfying the court that these were complied with lies upon the party seeking to establish the will. But the fact of such compliance may be proved by other evidence, or inferred from circumstances, where the subscribing witnesses are dead, or absent, or otherwise incapacitated to give testimony; or where from lapse of time, or otherwise, they are unable to recollect whether the requisite formalities were observed at the time when they witnessed the execution of the instrument." *Chaffee v. Baptist Church*, 10 Paige (N. Y.), 185 (1843), on p. 89.

¹ *Ross v. Ewer*, 3 Atkyns, 158, 160. Prior to this, in *Peate v. Ougley*, Comyns, 197, decided in 1710, the court, acting upon a will executed in 1679, the year after the statute was passed, held that the publication of the will was not essential.

² *Wyndham v. Chetwynd*, 1 Burr. 421; *Bond v. Seawell*, 3 Burr. 1775; *Moodie v. Reid*, 7 Taunt. 361; *White v. Trustees*, 6 Bing. 210; *Wright v.*

In the United States the question whether a testator must, at the time of the execution of the will, publish it, *i. e.*, declare the instrument that he is subscribing is his last will, depends wholly upon statutory regulations. In those jurisdictions where the English Statute of Frauds has been substantially re-enacted, no publication of the will by the testator is required. The witnesses need not know that the instrument which they attest is a will, for the law requires a subscription by witnesses only in order that the paper which is offered for probate as a will may be then identified as the same instrument which was executed by the testator in the presence of the witnesses.¹ But in the majority of the states an actual publication of the will is necessary under the statutes. The testator must declare to the witnesses that the instrument which he signs, and which they attest, is his will.²

§ 203. **The mode of the publication of the will.**—The statutes requiring publication of the will in the presence of the witnesses prescribe no particular form of words, nor any specified form of phraseology in which the declaration of publication must be couched. Any statement or communication³ by the testator to the witnesses at the time of execution, by means of which he informs them that the instrument which he has signed and which he requests them to attest is his will, is sufficient. The publication of a will required under a statute which provides that the testator shall declare his will in the

Wright, 7 Bing. 457, 20 Eng. C. L. R. 197.

¹ Smith v. Dolby, 4 Har. (Del., 1846), 350; Dickie v. Carter, 42 Ill. (1866), 376, 387; Hulse's Will, 52 Iowa, 662, 664; Scott v. Hawks (Iowa), 77 N. W. R. 467; Brown v. McAlister, 34 Ind. (1870), 375; Ray v. Walton, 2 A. K. Marsh. (Ky., 1819), 71, 74; Chisolm v. Ben, 7 B. Mon. (46 Ky., 1847), 408; Swift v. Wiley, 1 B. Mon. 118; Cilley v. Cilley, 34 Me. (1852), 162; In re Porter's Will, 20 D. C. 493 (under act Md. 1798, ch. 101, subch. 1, § 4); Watson v. Pipes, 32 Miss. (1856), 451; Sweet v. Boardman, 1 Mass. 258; Canada's Appeal, 47 Conn. 450, 1 Am. Pro. R. 1, 7; Tilden v. Tilden, 13 Gray (Mass.),

110; Hogan v. Grosvenor, 10 Met. (51 Mass., 1845), 54; Nickerson v. Buck, 12 Cush. (Mass.) 332 (construing Mass. Stat. 1783, chs. 24, 27); Black v. Ellis, 3 Hill (S. C., 1837), L. 68, 74; Gable v. Rauch (S. C.), 27 S. E. R. 209; Beane v. Yerby, 12 Gratt. (Va.) 239, 246; Walker v. Walker, 1 Gratt. (Va., 1845), 454; Kisecker's Estate (Pa., 1899), 43 Atl. R. 886; Dean v. Dean, 27 Vt. 346; Meurer's Will, 44 Wis. 392; Skinner v. Am. Bible Society, 92 Wis. 203, 209.

² Rogers v. Diamond, 18 Ark. 474, 488; Swift v. Wiley, 1 B. Mon. (Ky.) 114, 116; Compton v. Mitton, 12 N. J. Law, 70, 73; and see also cases in last note.

³ Coffin v. Coffin, 23 N. Y. 9, 15.

presence of witnesses may be performed *by any utterance or action proceeding from the testator, or from another by his request or direction and in his presence, by which the witnesses are informed that the paper which they see is the will of the testator and they are required to attest it as such.*¹ A publication is not proved where it appears that the witness, either because he was inattentive or preoccupied, was not conscious of the fact that a will was being executed.² And the fact, if proved, that the testator purposely withheld from the knowledge of the witnesses that the paper they were called on to attest was his will, is conclusive that it was not published as required by the statute.³

§ 204. Publication of the will by acquiescence or actions. In determining what shall be a sufficient publication it has been held that it is not necessary for the testator himself to state expressly in so many words that the instrument is his will.

¹ Darnell v. Buzby, 50 N. J. Eq. 752, 26 Atl. R. 676; Elkinton v. Brick, 44 N. J. Eq. 154, 15 Atl. R. 391; Morehouse v. Cotheal, 31 N. J. Law (1864), 480, 488; Combs v. Jolly, 3 N. J. Eq. (1841), 625, 628; Swain v. Edmunds, 53 N. J. Eq. 142, 33 Atl. R. 369; Thompson v. Stevens, 62 N. Y. (1875), 634, 635; Coffin v. Coffin, 23 N. Y. 9, 15; Lewis v. Lewis, 11 N. Y. (1853), 220, 13 Barb. 17; Gilbert v. Knox, 52 N. Y. 125; Jackson v. Jackson, 39 N. Y. (1868), 153, 159; Torrey v. Bowen, 15 Barb. (N. Y.) 304; Newhouse v. Godwin, 17 Barb. (N. Y., 1854), 236; Nipper v. Groesbeck, 22 Barb. (N. Y., 1856), 322; Abbey v. Christy, 49 Barb. (N. Y.) 276; McKinley v. Lamb, 64 Barb. (N. Y.) 199; In re Barber, 37 N. Y. Supp. 235, 92 Hun (1895), 489; Moore v. Moore, 2 Bradf. (N. Y.) 261; Campbell v. Logan, 2 Bradf. (N. Y.) 90; Carle v. Underhill, 3 Bradf. (N. Y.) 101, 106; Gombault v. Public Adm'r, 4 Bradf. (N. Y.) 226; Randeburgh v. Shelley, 6 Ohio St. 307; Brinckerhoof v. Remsen, 8 Paige (N. Y.), 488; Auburn Seminary v. Calhoun, 62 Barb. 381; Rugg v. Rugg, 83 N. Y. 592. "The object of this provision is to secure the testator against fraud and imposition,

and the knowledge that the instrument which the witnesses are called upon to attest is a will must be communicated to them by the testator at the time of his subscription or acknowledgment, and knowledge derived from any other source or at any other time of the same fact cannot stand as a substitute for the declaration of the testator. But the fact that the testator was fully apprised of the testamentary character of the instrument may be considered in aid of proof tending to establish a publication." By Andrews, J., in Gilbert v. Knox, 52 N. Y. 125, on p. 128.

² Darnell v. Buzby, 50 N. J. Eq. 742, 752, 26 Atl. R. 673; Super v. Wertz, 19 Oreg. 122.

³ In re Dale, 9 N. Y. S. 396, 56 Hun. 169. In practice a proper publication of a will is invariably secured by the question addressed to the testator by some one present, in the presence of the witnesses, "Is this your last will?" An affirmative answer or gesture in reply to this question is a good publication of the will. No objection can be urged against the putting of this question by a subscribing witness.

An affirmative answer or a gesture in reply to a question put to the testator by some one present whether the paper is his will,¹ or even silence on his part, the witnesses being present and in hearing when the question was put to him,² has been held a valid publication of the will. So an acknowledgment by the testator that he had heard the will read, and a signing by the witnesses in his presence at the request of the draughtsman, made in the hearing of the testator, has been held a sufficient publication.³

The publication ought to be contemporaneous with the execution. But the court, in determining whether a will has been properly published at the time of its execution, may take into consideration everything that was said or done by the testator in the presence of witnesses at or immediately before and after the actual time of the attaching of his signature to the will.⁴ Thus, where the testator, having instructed an attorney to prepare a will, procured the presence of two persons to whom he stated that he wished them to act as witnesses, and announced to the attorney, when the latter brought the will, that he had brought those persons to witness the will, it was held that the will was properly published.⁵ For a publication may be inferred from the actions of the testator alone, or taken in connection with all the facts which are attendant upon the execu-

¹ *Harrington v. Stees*, 83 Ill. 50; 36 N. Y. 416; *Abbey v. Christy*, 49 Higgins v. Carlton, 28 Md. (1867), 115; Barb. (N. Y.) 276.

Robbins v. Robbins, 50 N. J. Eq. 742, 26 Atl. R. 673; *Rogers v. Diamond*, 664, 113 Mo. 56.

² *Coffin v. Coffin*, 78 N. Y. 9, 15; *Reeve v. Crosby*, 8 Redf. (N. Y.) 74; *Jameson v. Jameson*, 4 Bradf. (N. Y.) 138; *Gombault v. Public Administrator*, 4 Bradf. (N. Y.) 226. *Contra*, *McCaleb v. Douglas*, 16 La. Ann. 327.

³ *Denny v. Pinney*, 60 Vt. 554, 13 Atl. R. 103.

⁴ *In re Kane's Will*, 20 N. Y. Supp. 123, 2 Con. Sur. 249; *Brinckerhoof v. Remsen*, 8 Paige, 488, 498. A statement in the attestation clause that the instrument is a will is not a good and sufficient publication of the will. *Brinckerhoof v. Remsen*, 8 Paige (N. Y., 1840), 488; *Baskin v. Baskin*,

⁴ *Grimm v. Tittman*, 20 S. W. Rep. 664, 113 Mo. 56.

⁵ *Hildreth v. Marshall*, 51 N. J. Eq. 241 (1898), 27 Atl. R. 465. And in *Robbins v. Robbins*, 50 N. J. Eq. 742, 26 Atl. R. 673, it was held that where the testator told two persons he meant to execute his will at a certain time and in a specified place, and requested them to attend the execution as witnesses to the will, and at the appointed time and place the testator signed his will, and then handed it to the witnesses, who also signed it, it is a good and sufficient publication, though the testator said nothing at the time of the execution as to the character of the instrument.

tion, but not from equivocal actions, or from statements which are fairly susceptible of a meaning which is inconsistent with the publication of the will.¹

§ 205. The competency of the person named as an executor or trustee as a subscribing witness.—It is universally admitted by the cases that an executor or trustee named in the will is competent as an attesting witness to it. The right which he has to fees for the administration of his office is not such a beneficial present and vested interest as will disqualify him either under the rules of the common law, or under a statute requiring the will to be subscribed by credible and disinterested witnesses. Aside from any gifts which may be made to an executor or trustee as a legatee, he receives no benefit under the will. His claim against the estate of his testator is based upon and allowed by reason of the theory of compensation for services rendered. By the English law the executorship was never an office of profit; and while an executor is, by statute, allowed a certain remuneration in this country, the money goes to him as compensation for labor performed and not as a gratuity. Besides this, he may never be an executor, though he has been named as such in the will; for no one can be an executor of a living person, and the testator may revoke the will or survive the person whom he has named as his executor. Accordingly, as we have seen, the witness being competent at the time of attestation, he is not rendered incompetent by anything which occurs subsequently.²

¹ *Darnell v. Buzby*, 50 N. J. Eq. 752 (1893), 26 Atl. R. 673; *In re Voorhis' Will*, 125 N. Y. 765, 767. "The signing or acknowledgment by the testator, and his declaration that the instrument is his last will and testament, are, in the statute, made contemporaneous, and neither must necessarily precede the other; and yet, in practice, this must be construed to mean on the same occasion, each as parts of the same transaction, and not requiring that the words of declaration should actually accompany the movement of the pen in signing, or be actually embraced in the terms of acknowledgment of such signing.

Practically which utterance is first is of no possible consequence." *Jackson v. Jackson*, 39 N. Y. 155, 165.

² See note in 2 L. R. A. 668. In the state of North Carolina it was at one time held that an executor was not a competent witness, nor was his wife, unless he should renounce his office. *Gunter v. Gunter*, 3 Jones' Law (N. C.), 441; *Daniel v. Procter*, 1 Dev. Law (N. C.), 428. In *Snyder v. Bull*, 17 Pa. St. 58, the court by Gibson, C. J., says: "Granting for the moment that the office of executor is a beneficial one, he was not an executor, though named, for no man living has an executor; but he might

§ 206. **The competency of a husband or wife of a legatee as a subscribing witness.**—The question of the competency of the husband or wife of a legatee as a subscribing witness divides itself into two branches. *First*. Is such a person competent at all? and *second*, if he or she is competent, is the legacy to the husband or wife of the witness void? In New York, under statutes by which incompetency because of interest has been abolished, where a woman was a witness to a will under which her husband derived a benefit, it was held that she was a competent witness, though the legacy to the husband was void.¹ But in England and in very many of the states, both

eventually be one. True, but he might not. He might die in the lifetime of the testator, or his nomination might be revoked, or he might not find it convenient to accept. He may have had the executorship in prospect; but a contingent interest does not disqualify a witness at the time of deposing, or for an equal reason at the time of attesting. Had he renounced he might have been sworn, yet his renunciation would not have been a release of an immediate interest. But an executorship is not an office of profit. In England the services are gratuitous, and though they are paid for here, the design of the allowance is compensation. It is sometimes more and sometimes less, but the executor is supposed to get nothing he has not earned, and if he gets too much it is the fault of the court, not of the law." See also as sustaining the text, *Comstock v. Hadlyme*, 8 Conn. 254, 262 (1830); *Meyer v. Fogg*, 7 Fla. 292; *Smith v. Smith*, 168 Ill. 488, 495; *Etheridge v. Bennett*, 9 Houst. (Del.) 295; *Jones v. Tebbetts*, 57 Me. 572, 574; *Jones v. Larrabee*, 47 Me. 474, 479; *Dorsey v. Warfield*, 7 Md. 65 (1854); *Warren v. Baxter*, 48 Me. 193; *Wyman v. Symmes*, 10 Allen (Mass.), 153; *Murphy v. Murphy*, 24 Mo. 526; *Orndorff v. Hummer*, 12 B. Mon. (Ky.) 419, 622; *Rucker v. Lambdin*, 12 Sm.

& M. (20 Miss.) 230; *Kelly v. Miller*, 39 Miss. 17 (1860); *Stewart v. Harri-man*, 56 N. H. 25, 1 Am. Pro. R. 95, 99; *Kittredge v. Hodgman* (N. H.), 82 Atl. R. 158; *Den v. Allen*, 2 N. J. Law (1806), 35; *McDonough v. Laughlin*, 20 Barb. (N. Y.) 238; *Gagan's Will*, 66 Hun, 632, 21 N. Y. Supp. 350; *Folt's Will*, 71 Hun, 492, 24 N. Y. Supp. 1052; *Children's Aid Society v. Love-ridge*, 70 N. Y. 387, 405; *Rugg v. Rugg*, 83 N. Y. 592-594; *Allison v. Allison*, 4 Hawks (N. C.), 161; *Tucker v. Tucker*, 5 Ired. (N. C.) L. 161; *Overton v. Over-ton*, 4 Dev. & B. (N. C.) 197; In re *Jordan's Estate*, 13 Pa. Co. Ct. R. 506, 167 Pa. St. 393, 34 W. N. C. 448, 29 Atl. R. 3; *Snyder v. Bull*, 17 Pa. St. 54; *Key v. Weathersbee*, 43 S. C. 414, 21 S. E. R. 324; *Taylor v. Taylor*, 1 Rich. (S. C.) L. 531; *Henderson v. Kenner*, 1 id. 474; *Richardson v. Richardson*, 35 Vt. 238; *Coulter v. Bryan*, 1 Gratt. (Va.) 18; *Bettison v. Bromley*, 12 East, 250. The same principles are applicable in the case of a trustee named in the will (*Cresswell v. Cresswell*, L. R. 6 Eq. 69), or who takes as a trustee by necessary implication. *Key v. Weathersbee*, 43 S. C. 414, 21 S. E. R. 324.

¹ *Jackson v. Wood*, 1 Johns. Cas. (N. Y., 1799), 163; *Jackson v. Durland*, 2 Johns. Cas. (N. Y., 1801), 313. See also *Fortune v. Buck*, 23 Conn. 1.

at common law and by statute, the rule undoubtedly is that the husband or wife of a legatee under the will is absolutely incompetent to testify as a subscribing witness.¹ So, too, it has been held that a statute which provides that any beneficial gift to a subscribing witness shall be void, and the witness shall be competent to prove the will, does not confer competency on a subscribing witness who is the husband or wife of a legatee.²

But very many of the more recent decisions favor the view that no person is competent as a witness to prove the will merely because his or her wife or husband is a legatee under it. These cases hold that the witness may testify and that the legacy is not void.³ This certainly would seem to be a reasonable view of the question from a modern standpoint, and in the light of the statutes which have, in every state of the Union, separated the property interests of husband and wife, and which have made each, so far as his or her property rights and obligations are concerned, absolutely independent of the other.⁴ Where a statute prohibits the proof of a will by interested witnesses, and then defines "interested witnesses" as those related to persons interested within the sixth degree of consanguinity, it was held, in a will contest, that mere relationship to the testator is not material, as he is not a person interested.⁵ Hence, the brother of the testator,⁶ or his disinherited heir,⁷ may tes-

¹ *Fisher v. Spencer*, 150 Ill. (1894), 253, 37 N. E. R. 314; *Smith v. Smith*, 168 Ill. 488, 491, 48 N. E. R. 96; *Sullivan v. Sullivan*, 106 Mass. 473, 475; *Winslow v. Kimball*, 25 Me. 493, 495; *Rucker v. Lambdin*, 20 Miss. (1849), 230, 257; *Giddings v. Turgeon*, 58 Vt. 106 (1886), 4 Atl. R. 711; *Hatfield v. Thorp*, 5 B. & A. 589; *Holdfast v. Dowsing*, 2 Str. 1258; *Windham v. Chetwynd*, 1 Burr. 414, 424, 1 W. Bl. 95, 100.

² *Fisher v. Spencer*, 150 Ill. 253, 37 N. E. R. 314; *Sullivan v. Sullivan*, *supra*. In South Carolina the statute provides that a devise, to which the husband of the devisee is a subscribing witness, shall be void to the extent that the amount of the devise

exceeds the amount that the devisee would have taken as heir. *Key v. Weathersbee*, 43 S. C. 414, 21 S. E. R. 324, construing Rev. St. S. C., § 1991.

³ *Bates v. Officer*, 70 Iowa (1886), 343, 344, 30 S. W. R. 608; *Hawkins v. Hawkins*, 54 Iowa (1890), 443, 446, 6 N. W. R. 699; *In re Holt's Will* (Minn.), 57 N. W. R. 219; *Kittredge v. Hodgman* (N. H., 1892), 32 Atl. R. 158; *Lippincott v. Wikoff* (N. J.), 33 Atl. R. 305.

⁴ *Gamble v. Butcher*, 87 Tex. 643, 30 S. W. R. 861, 862.

⁵ *Jones v. Larrabee*, 47 Me. (1900), 474, 477.

⁶ *Jones v. Larrabee*, 47 Me. 474.

⁷ *Nash v. Reed*, 46 Me. 168, 175, 237, 239; *Smalley v. Smalley*, 70 Me. 545.

tify as an attesting witness upon the probate. And under a statute which provides that a devise shall be attested by two witnesses not "*interested in the devise*," one who would be the heir of the testator, if he had died intestate, is not "*interested in the devise*."¹

§ 207. **The competency of a member of a corporation which is a beneficiary to act as an attesting witness.**—The decisions are not harmonious upon the competency of a member of a religious society as an attesting witness to a will by which the society receives a benefit. Every member of a religious society or local church organization is interested to a certain extent in its financial condition and prosperity. This interest may be great or small, according to circumstances. Some cases hold that the interest of a member does render him incompetent as a witness to the execution of the will benefiting the society.² Others take a contrary view.³

It is now settled that an inhabitant, meaning thereby a property owner or taxpayer of a city, town, village or other municipal or *quasi*-municipal corporation, is a competent attesting witness to a will which confers a gift to be used for municipal purposes by the corporation.⁴

The competency of the witness is to be determined according to the rules of the common law. In rejecting a witness because of his interest in the issue, it is necessary in the first instance to determine what his interest is. By the common law, the interest which would disqualify must be one that is legal, substantial, present, vested and *ex parte*. A mere expectation of gain or fear of loss in the breast of the witness does not disqualify him. The interest which a taxpayer has

¹ Maxwell v. Hill, 89 Tenn. 584, 15 S. W. R. 253.

² Quinn v. Shields, 62 Iowa, 129, 133, 17 N. W. R. 487.

³ Goodrich's Appeal, 57 Conn. 275, 18 Atl. R. 49; Warren v. Baxter, 48 Me. 193, 194; Patten v. Tallman (1847), 27 Me. 17. The fact that the testator gives a legacy to an incorporated society organized for the purpose of maintaining a hall, "in part to secure a liberal policy in respect to the use of the hall for objects of public

interest," does not render a stockholder of such corporation an incompetent witness. In re Marston, 79 Me. (1887), 25, 8 Atl. R. 87.

⁴ Cornwell v. Isham, 1 Day (Conn.), 85, 41; Warren v. Baxter, 48 Me. 195; Piper v. Moulton, 72 Me. 155, 158; Marston's Petition, 79 Me. 25, 48, 8 Atl. R. 87; Hawes v. Humphrey, 9 Pick. (Mass.) 350, 356; Loring v. Park, 7 Gray (73 Mass.), 42; Northampton v. Smith, 11 Met. (52 Mass., 1846), 390; Eustis v. Parker, 1 N. H. (1820), 273.

in the property devised is too shadowy, slight and unsubstantial to influence him. If it is shown that he is to be exempted from the payment of a portion of his taxes because of the legacy, it might be enough, but until this is done the *mere probability that he may benefit* is immaterial. In the case of a large and populous municipality, containing many thousands of taxpayers, it would take a vast amount of time and trouble, and a very eminent mathematical genius, to calculate what material benefit was conferred on each individual taxpayer by a legacy of a few thousand dollars for the city's poor, or for some other object within the range of the statutory functions of the municipality.¹

§ 208. The legal or medical adviser of the testator as a subscribing witness.—It frequently happens that the lawyer who draws the will, the physician who is in attendance upon the testator, or the priest who may have administered to him the last rites of his religion, acts as a subscribing witness. In nearly every state of the Union, communications made to such persons, or information obtained by them in the course of their professional employment, and which were necessary to enable them to perform their duties, are privileged. They are forbidden to divulge them as witnesses without the consent of the client or patient. These statutes, according to the majority of the cases, do not apply to statements made by a testator during the execution of the will to privileged persons who act as subscribing witnesses, or to information which the latter may obtain while acting as such. For it is conceived that a request by the testator to his attorney or physician to act as a subscribing witness is an *implied* waiver of the statutory privilege.²

And, moreover, those communications and information which

¹ The fact that a town is authorized by statute to raise money for the maintenance of a public library does not, at common law, disqualify a property owner, by reason of interest, from becoming an attesting witness to a will leaving a fund in trust to buy books for the town library. Nor is he disqualified by reason of the use which he may have of the books purchased with the fund. *Hitchcock v. Shaw*, 35 N. E. R. 671, 160 Mass. 140.

² *In re Coleman*, 114 N. Y. (1889), 220, 228; *In re Gagan's Will*, 20 N. Y. S. 426, 21 N. Y. S. 350, 66 Hun, 632; *McMaster v. Scriven*, 83 Wis. (1893), 162, 168; *Pitt's Estate* (Wis., 1893), 55 N. W. R. 149; *O'Brien v. Spalding* (Ga., 1897), 31 S. E. R. 100, sustain the text. But see *contra*, *Flint's Estate*, 100 Cal. (1893), 391, 34 Pac. R. 865; *Gurley v. Park*, 35 N. E. R. (1893), 279, 135 Ind. 440.

pass during the execution of the will are in no sense private, because other persons than the client and the attorney or physician are always present.¹ Hence an attorney or a physician may testify to the facts or circumstances attending the execution, including the mental condition of the testator, and his declarations showing his state of mind, though he may have acquired this information partly by reason of the professional relation existing.²

§ 209. The republication by the execution of a codicil attested by competent witnesses.—The republication of a will in which an attesting witness is given a legacy, by a codicil attested by competent witnesses, will prevent the legacy to the witness from failing; for he is not then called upon to testify.³ And generally, where the will can be proved without the testimony of an incompetent witness, it would seem reasonable to give him his legacy.

In England, construing similar statutes, it has been held that the mere fact that the witness was a supernumerary witness—there being more attesting witnesses than the law requires,—is not enough to prevent his legacy from failing, though the court may receive his evidence to show with what intent his name was signed to the will.⁴

¹ Perhaps the fact that third persons are present, and that they hear the communications made by the testator to his attorney, is the only ground on which the instructions given to an attorney for the purpose of framing the will are admissible. *Loder v. Whelpley*, 18 N. E. R. 874, 111 N. Y. 229; *In re Coleman*, 19 N. E. R. 71, 111 N. Y. 220; followed *In re McCarthy's Will*, 65 Hun, 624, 20 N. Y. S. 581.

² *McMaster v. Scriven*, 85 Wis. 162, 168; *In re Coleman*, 111 N. Y. (1888), 220, 228; *In re Pitt's Estate* (Wis.), 55 N. W. R. 149. In California a will contest is a civil action, within the statute which forbids a physician to divulge information as a witness in a civil action. *Flint's Estate*, 100 Cal. 391, 34 Pac. R. 863. Though a statute may permit a personal representative of a patient to waive the

statutory privilege as to communications, the physician cannot testify as to the mental condition of the testator from his conversations with him, as in a will contest there is no legal representative of the testator within the meaning of the statute. *Gurley v. Park*, 135 Ind. 440, 35 N. E. R. 279. An attorney who draws a will and who acts as an attesting witness may testify to the same class of facts as other subscribing witnesses, though he may have obtained a knowledge of these facts in a professional capacity. *O'Brien v. Spalding* (Ga., 1897), 81 S. E. R. 100.

³ *Anderson v. Anderson*, L. R. 13 Eq. 381; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360.

⁴ *Gaskin v. Rogers*, L. R. 2 Eq. 284; *Randfield v. Randfield*, 32 L. J. Ch. 668; *Wigan v. Rowland*, 11 Hare, 157.

§ 210. **Substitutionary proof of execution in case of the death, absence or insanity of a witness.**—The proponent of the will ought to produce the subscribing witnesses at the probate. The fact that he does not may, unless properly explained, raise a suspicion against him.¹ Where it appears that one or both of the subscribing witnesses are dead their production will be dispensed with; and, if both are absent, their handwriting may be proved as in ordinary cases where the proof of handwriting becomes necessary, as by the testimony of some person who is acquainted with their handwriting or by similar evidence.² The rule dispensing with the production of an attesting witness is now recognized where the witness is absent from the state and is beyond the reach of process. As the production of the witness would be impossible, it will be dispensed with, and the proponent may prove his handwriting, or, in case this is not possible, he may prove the execution of the will by the testimony of any persons who were present and have a competent knowledge of the facts. If the memory of these witnesses is weak it may be aided by the recitals contained in a full and carefully-worded attestation clause. It is not necessary to show that the absent witness is out of the United States, if it has been shown that he is out of the state, or if it appear that, being in the state, his whereabouts are unknown to the proponent.³

¹ *Sears v. Dillingham*, 12 Mass. Barb. (N. Y., 1847), 526, 533; *Lewis v. (1815)*, 358, 362; *Howes v. Colburn*, 165 Mass. 385, 386; *Chase v. Lincoln*, 3 Mass. (1807), 296; *Dean v. Dean*, 27 Vt. 746, 749.

² *Deakes' Appeal*, 80 Me. 50, 54, 12 Atl. R. 790; *In re Lewis' Will*, 51 Wis. 10, 13; *Snider v. Burks*, 84 Ala. 53, 4 S. R. 225; *Allison v. Allison* (Iowa), 73 N. W. R. 489; *In re Convey*, 52 Iowa, 197, 200; *Scott v. Hawk* (Iowa, 1898), 75 N. W. R. 368; s. c., 15 S. E. R. 836; *Dean v. Dean*, 27 Vt. 746, 749; *Sullivan v. Sullivan* (Mich., 1897), 72 N. W. R. 185; *Barker v. McFerran*, 26 Pa. St. 211; *Greenough v. Greenough*, 11 Pa. St. 489; *Barnes v. Barnes*, 66 Me. (1877), 286, 296; *Ela v. Edwards*, 16 Gray, 91, 93; *Butler v. Benson*, 1 Barb. (N. Y., 1847), 526, 533; *Lewis v. Lewis*, 13 Barb. 17, 27; *Hopkins v. Albertson*, 2 Bay (S. C., 1803), 484. See also *Verdier v. Verdier*, 8 Rich. L. (S. C., 1855), 135, 142; *Nelius v. Brickell*, 1 Hayw. (2 N. C., 1792), 19; *Nickerson v. Buck*, 12 Cush. (Mass.) 332, 342, 344. Where one or more of several subscribing witnesses are deceased, the testimony of any witness who may survive at the probate, that he saw those who are deceased sign their names as witnesses, is usually conclusive of that fact. *In re Jones' Will* (Wis.), 70 N. W. R. 635.

³ *Troeder v. Hyams* (Mass., 1891), 27 N. E. R. 775; *Homer v. Wallis*, 11 Mass. 309, 311; *Sluby v. Chaplin*, 4 Johns. (N. Y., 1809), 461; *Cook v.*

The incompetency of a witness who was competent at the execution of the will, but who has subsequently become incompetent, is, for the purpose of the rule, equivalent to his death or absence from the jurisdiction. So where a competent attesting witness has become incompetent because he has subsequently married a legatee, or because he has been elected the judge before whom the proof of execution is to be taken, or otherwise, his signature may be proved in the usual mode; and the facts of execution may be shown by the same evidence as in the case of the absence of a witness from the jurisdiction.¹

In many states statutes have been enacted regulating the mode of proving the execution of a will in case of the death, absence or insanity of one or both of the attesting witnesses. In Illinois² it is provided that, where a witness to a will dies before probate, it shall be lawful to admit proof of his handwriting, and such other secondary evidence as is admissible to establish written contracts generally.³ In North Carolina the statute⁴ is to the effect that no written will can be admitted to probate, except on the oath of at least two witnesses if living, or, if one of such witnesses is dead, such proof may be taken of the handwriting, both of the testator and the deceased witness, as will satisfy the court of its genuineness and due execution of the will.⁵

None of these statutes refer to the case of the absence of the

Husted, 12 Johns. (N. Y., 1815), 188; Vernon v. Kirk, 30 Pa. St. 218, 222; Dunbar v. Marden (1842), 13 N. H. 311, 318; Denny v. Pinney's Heirs, 60 Jones v. Aterbourne, 11 Humph. (30 Tenn., 1850), 972.
Vt. 524, 527; Farnsworth v. Briggs, 6
N. H. (1833), 561; Dudley v. Sumner, 5 Mass. 462; Cook v. Woodrow, 5 Cranch (9 U. S., 1809), 13; Livingston v. Burton, 11 Johns. (N. Y.) 64; Whittemore v. Brooks, 1 Me. (1820), 57; Molward v. Temple, 1 Camp. 375; Bernell v. Taylor, 9 Ves. 381; Prince v. Blackburn, 2 East, 250; Pytt v. Griffith, 6 J. B. Moo. 538; Adams v. Norris, 23 How. (U. S.) 353.
² Starr & C. Ann. Stats., p. 2469, par. 6.
³ Proof by a surviving witness and two other persons that the deceased executed the will, that an attesting witness signed the will, and that he is dead, is sufficient. Robinson v. Brewster, 140 Ill. 649, 30 N. E. R. 683; Hobart v. Hobart, 154 Ill. 610, 53 Ill. App. 133, 39 N. E. R. 581.
⁴ § 2148 of the Code.

⁵ Hawes v. Humphrey, 9 Pick. (26 Mass.) 350, 357; Sears v. Dillingham, 12 Mass. (1815), 358, 361, 363; Jauncey v. Thorne, 2 Barb. Ch. (N. Y., 1847), 40; Patten v. Tallman, 27 Me. 17, 29; 148.
⁶ In re Thomas' Will, 16 S. E. R. 22, 111 N. C. 409. The statute in the state of Washington is similar. Harris v. Harris, 10 Wash. 555, 39 Pac. R.

witness or his incompetency. But the New York statute¹ provides that where one or both of the subscribing witnesses are dead, or incompetent because of insanity, or are absent from the state, and the surrogate is satisfied that their testimony cannot be obtained by a commission, or if a subscribing witness has forgotten the occurrence and testifies against the execution of the will, it may still be proved by proving the handwriting of the testator and of the witness, and by proof of any other circumstances as would suffice to prove the will in an action.²

§ 211. **Forgetfulness of the subscribing witnesses.**—The granting of probate does not depend *upon the strength of the memory of the attesting witnesses*. So, if the statements of the several attesting witnesses when on the stand disagree, or if they contradict one another, the court of probate must endeavor to reconcile that which is contradictory, and may go outside of their testimony for circumstances to sustain the will. Thus, the court has a right to look at and to read the attestation clause for evidence of any necessary facts constituting a valid execution, in case the memory of both or of either of the attesting witnesses does not retain the evidence of the necessary fact. And if the memory of any one of the attesting witnesses is weak, or if the impression made upon his mind by the facts of execution has become so dim, by reason of the lapse of time, or because of the happening of other facts which were of more importance to his personal interests, that, when called at the probate to prove the execution of the will, he cannot recall some essential fact or facts of the execution, the forgotten facts may be proved by the testimony of the other attesting witnesses.³

¹ Code Civ. Proc., sec. 2620.

² Where a will is signed by a mark it must be proved, under this statute, that the testator in fact made the mark. In re Porter, 22 N. Y. Supp. 1062, 1 Misc. R. 262; In re Hyland, 27 N. Y. S. 961; In re Wilson, 76 Hun, 1. The statute is permissive, and a will may be probated without taking the testimony of the absent witness. In re Clark, 75 Hun, 471, 27 N. Y. Supp. 68.

³ Rogers v. Diamond, 13 Ark. 474, 488; Wild v. Sweeny, 84 Ill. (1876), 212; Canatsey v. Canatsey, 130 Ill. 397 (1889), 22 N. E. R. 595; Dewey v. Dewey, 1 Met. (Mass.) 349, 353; Barnes v. Barnes, 66 Me. 286, 296; Howard's Will, 5 T. B. Mon. (Ky.) 199; Lawyer v. Smith, 8 Mich. (1860), 411, 424; Abbott v. Abbott, 41 Mich. 540 (1879); In re Boardman's Will, 20 N. Y. Supp. 60; In re Frey's Will, 7 N. Y. Supp. 330; In re McKenna's Will, 4 N. Y.

So, too, in case all the attesting witnesses prove forgetful of any fact essential to a valid execution, the fact may be proved by the testimony of any person who was present at the execution. Thus where, after the lapse of many years, both attesting witnesses were unable to recollect whether the testator had acknowledged his signature in their presence at the time of the execution;¹ or where an attesting witness is not certain whether the testator requested him to sign;² or where one witness is not sure that the testator signed the will in his presence;³ or where the attesting witnesses are not sure that the testator signed before they did,⁴—these facts may be proved by the evidence of a person who, being present at the execution, has a competent knowledge of them.

§ 212. The impeachment of the attesting witness if he is hostile.—The rule that a party shall not be permitted to impeach his own witness is subject to an important exception in the case of a subscribing witness. A party who propounds a will is not presumed to vouch for the veracity of a witness whom the law compels him to call. Under the rule he vouches only for the veracity of his own witness, *i. e.*, for one whom he has chosen voluntarily as having knowledge of facts which are essential to his case. The witness *whom the law thrusts upon* him and *compels him to call* cannot properly be termed *his own* witness. The party for whom the witness testifies does not vouch for him. Hence, if a subscribing witness unexpectedly proves hostile at the probate, and testifies that some one or more of the statutory requirements have not been complied with, denies his signature, or testifies against the testamentary

Supp. 458; In re Landy's Will, 29 N. Y. Supp. 136, 78 Hun, 479; In re Townley's Will, 1 Con. Sur. 400, 4 N. Y. Supp. 455; In re Wilcox's Will, 14 N. Y. Supp. 109, 59 Hun, 627; Trustees v. Calhoun, 25 N. Y. (1862), 420, 425; Jackson v. Christman, 4 Wend. (N. Y.) 277, 282; Tarrant v. Ware, 25 N. Y. 425, n.; Newhouse v. Godwin, 17 Barb. (N. Y.) 236; Mundy v. Mundy, 15 N. J. Eq. 290, 293; Compton v. Mitton, 12 N. J. L. 70, 73; Haynes v. Haynes, 33 Ohio St. 598; Dudleys v. Dudleys, 8 Leigh (Va.), 480, 443; Riordan v. O'Hagan (Wis.), 40 N. W. R. 649; Meurer's Will, 44 Wis. 392, 399; Davis v. Mason, 1 Peters (U. S.), 509; Longford v. Eyra, 1 Peere Wms. 740; Woodhouse v. Balfour, L. R. Prob. Div. 2, 4.

¹ In re Lantry's Will, 52 Hun, 615 (1889), 5 N. Y. Supp. 501.

² In re Buckley's Will, 2 N. Y. Supp. 24.

³ Farley v. Farley, 50 N. J. Eq. 484, 26 Atl. R. 178.

⁴ Rugg v. Rugg, 83 N. Y. 592, 524.

capacity of the testator or against the voluntary character of the will, he may be contradicted by other witnesses.¹

§ 213. The mode of impeaching a hostile subscribing witness.—The party who desires to impeach a subscribing witness is not under the necessity of confining himself to indirect impeachment by the testimony of other witnesses to the facts of execution which may be contradictory to the testimony of the subscribing witness. He may impeach the attesting witness directly by showing his bad reputation for veracity and by proving his inconsistent statements made out of court. If he denies the genuineness of his signature, the fact that he wrote it may be proved by his extrajudicial admissions, or in any of the modes generally admissible in the case of disputed handwriting.²

If he deny that an act, which is required by statute to be done to constitute a valid execution, was performed, he may be contradicted by proving his contradictory extrajudicial statement that such act was done. So, where the subscribing witness denies that the testator possessed testamentary capacity, it is admissible to prove his declarations that he had testa-

¹ *Gillis v. Gillis*, 96 Ga. 1, 15, 23 S. E. R. 107; *Hall v. Hall*, 18 Ga. (1855), 45; *Deupree v. Deupree*, 45 Ga. 442; *Harp v. Parr*, 168 Ill. 459, 472, 48 N. E. R. 118; *Dennett v. Dow*, 17 Me. 19, 23; *Shorey v. Hussey*, 32 Me. (1851), 579; *Brown v. Bellows*, 4 Pick. (Mass.) 194, 197; *Whitaker v. Salisbury*, 15 Pick. (32 Mass., 1833), 534, 544; *Dewey v. Dewey*, 1 Met. (Mass.) 349; *Martin v. Perkins*, 56 Miss. (1878), 204, 210; *Garrison v. Garrison*, 15 N. J. Eq. 266, 270; *Mays v. Mays* (Mo.), 21 S. W. R. 921; *Edwards v. Crenshaw*, 30 Mo. App. (1888), 510; *Sigfrid v. Levan*, 6 S. & R. (Pa., 1820), 308; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158, 162; *Jauncey v. Thorne*, 2 id. 40, 68; *Scribner v. Crane*, 2 Paige (N. Y.), 147; *Orser v. Orser*, 24 N. Y. 51, 52; *Seminary v. Calhoun*, 25 N. Y. 422; *Peck v. Cary*, 27 N. Y. 9, 27; *In re Ware*, 25 N. Y. 425; *In re McKenna's Will*, 4 N. Y. S. 457. "The subscribing witnesses to a will must, if practicable, be called and examined; but the fate

of a will does not depend entirely upon their testimony. Upon the trial of an application to prove a will in solemn form, they are, all of them, unless accounted for, indispensably necessary witnesses; but the testimony, even as to the *factum* of execution, is not confined to them. The fact to be established is the proper execution of the will. If that is proved by competent testimony, it is sufficient, no matter from what quarter the testimony comes, provided the attesting witnesses are among those who bear testimony or their absence is explained. . . . The law does not allow proof of the valid execution and attestation of a will to be defeated at the time of probate by the failure of memory on the part of any of the subscribing witnesses." *Gillis v. Gillis*, 96 Ga. 1, p. 15.

² *Rice v. Oatfield*, 2 Str. 1096; *Goodtitle v. Clayton*, 4 Burr. 32, 24; *Dennett v. Dow*, 17 Me. 19, 22.

mentary capacity, solely for the purpose of discrediting the witness, to which use the evidence ought to be limited by proper instructions. For these declarations are not competent as direct proof of testamentary capacity or as proof of what the opinion of the witness was at the time they were uttered.¹

The testimony of the subscribing witnesses, though indispensable if it is procurable, is never conclusive. While it may possess much weight because of the fact that they are actual participants in the transaction which they describe, its weight is wholly matter of fact and not of law. The law makes no presumption in favor of the testimony of a subscribing witness, and, if he testifies against the will, will always permit the introduction of other evidence. It may be difficult to prove a will where all the subscribing witnesses testify against it, or testify that the testator did not possess capacity. But it is not in law impossible to do so, if the proponent has sufficient proof by other witnesses, and, *a fortiori*, he may very readily do so when one only of the subscribing witnesses denies the validity of the will. And, as matter of law, a person who as a subscribing witness goes upon the stand and upon his oath asserts to be false that which at the execution of the will he, by a most solemn act, asserted to be true, deserves to be discredited, and is worthy of but little belief.²

§ 214. Statutes disqualifying interested persons as witnesses to transactions with the testator.—In many states statutes exist which provide that no person interested in the event of an action, and no person claiming by or under the

¹ *Dennett v. Dow*, 17 Me. 19, 22; *Thornton v. Thornton*, 39 Vt. (1866), 129; *Foster v. Dickerson*, 64 Vt. 233; 21 Atl. R. 278; *Mason v. Poulson*, 43 Md. 161, 177 (1875), 40 Md. 355; *Brown v. Bellows*, 4 Pick. (21 Mass., 1827), 179; *Beaubien v. Cicotte*, 12 Mich. 459; *Scribner v. Crane*, 2 Paige (N. Y.), 147. In *Baxter v. Abbott*, 7 Gray (73 Mass., 1856), 71, declarations contradicting the statements of a deceased witness as to the capacity of the testator were held inadmissible. See also *Frear v. Williams*, 7 Baxt. (66 Tenn.) 550, 556; *Hildreth v. Aldrich* (1895), 15 R. L. 163, 164; *Williams v. Walker*, 2 Rich. Eq. (S. C.) 291, 294; *Howard v. Brathwait*, 1 Ves. & B. 208; *Williams v. Walker*, 2 Rich. Eq. (S. C.) 291, 294. Lord Mansfield was of the opinion that a subscribing witness impeaching his own act was deserving of the pillory. *Walton v. Shelly*, 1 T. R. 300.

interested person, shall be competent to testify against the personal representative of a deceased person as to any communication from or transaction with the deceased.

Whether these statutes are applicable to the testimony at the probate of legates, or of the next of kin contesting a will, is not settled. On the one hand, it has been held that next of kin contesting the will cannot testify to conversations or transactions between them and the testator relative to the testamentary disposition of his property.¹ Thus, a legatee cannot testify that the will was read to the testator in his presence, as that is a transaction with the decedent.² But in some states legatees are not regarded as disqualified by interest, and may testify to mental capacity or execution, though not subscribing witnesses.³ So a statute which provides that, where one of the original parties to the cause of action is dead, a person interested shall not testify against his personal representative, does not disqualify a legatee from testifying to the mental capacity of the testator,⁴ or from testifying to his declarations regarding the disposition of his property.⁵ And a devisee is competent in an action to set aside the will, unless it appears that he would receive more as the heir of the testator than as a devisee.⁶

§ 215. *Re-execution defined.*—Some obscurity has been cast upon the subject of the re-execution of wills by applying the term “republication” to it. The two words are not synonymous. In England the term “republication” signified repeating the declaration that the instrument is the will of the testator, which, prior to the passage of the Victorian statute of wills, was necessary to be made by the testator at the signing of the will. Inasmuch as a publication of the will has in England been dispensed with by statute, and as it has never been required in

¹ *In re Goldthorp*, 94 Iowa, 336, 338 (1895), 62 N. W. R. 845; *Lasak's Will*, 131 N. Y. 624 (1892), 30 N. E. R. 112; *Bedlow's Will*, 87 Hun, 408, 22 N. Y. S. 290.

² *Goerke's Will*, 80 Wis. (1891), 516, 520, 50 N. W. R. 845; *In re Silverthorne*, 68 Wis. (1887), 372.

³ *Gamble v. Butcher*, 80 S. W. R. 861, 87 Tex. 648; *Collins v. Collins*, 101 N. C. 114, 7 S. E. R. 687.

⁴ *Foster's Ex'rs v. Dickerson*, 64 Vt. 233, 24 Atl. R. 253.

⁵ *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. R. 354. A husband who is a contestant of the will of his wife cannot testify to conversations had with her during the marriage. *Maynard v. Vinton*, 59 Mich. 139.

⁶ *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. R. 620.

a majority of the American states, the employment of the term "republication" to describe the ceremony of repeating those formalities which are necessary to the proper execution of a will is misleading and productive of confusion. Hence, we will employ the term "re-execution" of wills to describe that act by the testator, taking place after the original execution, by force of which a will is brought forward in point of time and is made to operate as though executed in fact at the date of its re-execution. In other words, a will re-executed is equivalent to a new will, the date of which is the codicil or new *testimonium* and attestation clauses by which it is re-executed.¹

Re-execution or republication, as it is called, may be either express or constructive. An express re-execution occurs where a testator, with the intention to re-execute a will, adds a codicil for that purpose and repeats those formalities which in law are a valid execution, as he may do in case his mind is in doubt as to the validity of the previous will, or in case he wishes to revive a will which he has revoked.

A constructive re-execution occurs where the testator adds a codicil to his will, adding to or deducting from its dispositive parts, but without an express intention stated in the codicil to re-execute the will.

§ 216. **The constructive re-execution of a will by a codicil.** It was very early determined that the valid execution of a codicil would operate as a constructive re-execution of an existing will, though the testator, in the codicil, did not *in express terms ratify or confirm the will*. The presumption of an intent to re-execute the will arose without any expression of an intention to that effect in the codicil.² Under this rule, a will which was invalid because of its improper execution would be rendered valid by a duly-executed codicil intended to devise lands acquired subsequently to the execution of the will.

The presumption of an intention to republish or re-execute a will arising from the subsequent execution of a codicil not referring to it was never conclusive, and might be rebutted by

¹ See cases in note 2, p. 296.

² "Constructive republication," says Jarman (ch. VII, p. 193), "takes place where a testator makes a codicil to his will for some other purpose;

and that, though the codicil expressed no intention to republish, and though it was annexed to or declared to be a part of, and did not in terms confirm, the will."

the character of the disposition made by the codicil. The tendency of the modern cases is to treat the matter as one of intention upon the part of the testator. In the majority of the cases which have been determined during the last twenty-five years and which support the doctrine of re-execution by a codicil, it will be found that the codicil contained some expression of an intention to ratify, confirm and republish the will, or, at least, some language recognizing the will as existing and valid; as, for example, a reference to it by date or otherwise. In the absence of such an express ratification or affirmance, or of any reference to the will as existing, sufficient to incorporate it by such reference, it is doubtful whether the courts in the United States would recognize the rule of constructive republication by codicil to the extent to which it is laid down by the English writers. Where upon all the facts the will is re-executed by the codicil, it is not material that the two writings are not attached.¹ The two documents are to be regarded as one in law. The will is incorporated in the codicil and becomes a constituent part of it by such incorporation. Every defect in the execution of the will is absolutely cured by its incorporation in the properly-executed codicil. If the will was made when the testator lacked testamentary capacity, it is validated by a codicil made when he had the capacity. So, if the will is the product of undue influence, and the deceased subsequently, when he is entirely free from such influence, executes a codicil referring to or expressly ratifying the will, the will is validated by the codicil. In every case the two instruments taken together speak from the date of the codicil, and they should be read and construed together as the last will of the deceased, and ought to be admitted to probate as such.²

¹ *Payne v. Payne*, 18 Cal. 291; *Pope v. Pope*, 95 Ga. 87, 93, 22 S. E. R. 245.

² *Barker v. Bell*, 46 Ala. 216; *Payne v. Payne*, 18 Cal. (1861), 291, 302; *Pope v. Pope*, 95 Ga. 87, 93, 22 S. E. R. 245; *Jones v. Shewmake* (1866), 35 Ga. 151, 154; *Whiting's Appeal*, 67 Conn. 380, 389; *Hobart v. Hobart*, 53 Ill. App. 133, 135, 154 Ill. 610, 613; *Camp v. Shaw*, 52 Ill. App. 241; *Duncan v. Duncan*, 23 Ill. 304, 306; *In re Murfield*, 74 Iowa, 479, 38 N. W. R. 170; *Love v. Johnston*, 12 Ired. (N. C.) L. 355; *Armstrong v. Armstrong*, 14 B. Mon. (Ky., 1853), 333, 338; *Davis v. Taul*, 6 Dana (Ky., 1837), 51, 52; *Beall v. Cunningham*, 3 B. Mon. (Ky.) 390, 393; *Sharp v. Wallace*, 83 Ky. 584; *Langdon v. Pickering* (1841), 19 Me. 214, 217; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118, 133; *Haven v. Foster*, 14 Pick. (Mass., 1833), 534, 542; *Hosea v. Jacob*, 98 Mass. 65, 68; *Harvey v. Chouteau*, 14 Mo. 587, 594; *Barney v. Hays*, 11

§ 217. **The mode of re-execution.**—Inasmuch as a will of personal property might, at common law, have been made by parol, a republication by the same method was allowable. By the Statute of Frauds the same rule as to execution was applied to bequests as had been applicable to devises. Hence it is the rule at present, both in England and the United States, that the re-execution of a will, whether of real or personal property, requires the performance of the same formalities that are requisite for its original execution. A re-execution by parol is not sufficient. It is not allowable to introduce the oral declarations of the testator to show that he re-executed a will which it conclusively appears he has revoked in one of the modes prescribed by the statute. And where the re-execution is alleged to have been in writing, if the instrument purporting to be a codicil is unattested, or is not sufficiently attested, it is not a valid re-execution of the will.¹

Mont. 99, 106, 27 Pac. R. 384; Hawke v. Euyart, 30 Neb. 149, 160, 46 N. W. R. 422; Snowhill v. Snowhill, 23 N. J. L. 447; McCurdy v. Neall, 42 N. J. Eq. 333, 336, 7 Atl. R. 566; Hardenburgh's Will, 33 N. Y. S. 150, 85 Hun, 580; Brown v. Clark, 77 N. Y. 369; Van Cortlandt v. Kip, 1 Hill (N. Y.), 590, 598; Mooers v. White, 6 Johns. Ch. (N. Y.) 360, 375; Westcott v. Cady, 5 Johns. Ch. (N. Y.) 340; Murray v. Oliver, 6 Ired. Eq. (N. C.) 55; Neff's Appeal, 48 Pa. St. 501, 507; Wicoff's Appeal, 15 Pa. St. 281, 291; Rose v. Drayton, 4 Rich. Eq. (S. C., 1852), 260, 262; Hatch v. Hatch, 2 Hayw. (N. C.) 233; Campbell v. Barrera (Tex.), 32 S. W. R. 724; Chaddick v. Haley, 81 Tex. 617, 17 S. W. R. 238; Hatcher v. Hatcher, 80 Va. 169, 173; Corr v. Porter, 33 Gratt. (Va.) 288; Musser v. Curry, 3 Wash. C. C. 481; Brownell v. De Wolf, 3 Mason C. C. 486; Skinner v. Am. Bible Soc., 92 Wis. 209, 213, 65 N. W. R. 1037; Acherly v. Vernon, 3 Bro. P. C. 107, Com. 381; Piggott v. Waller, 17 Ves. Jr. 98, 117; Crosbie v. McDoual, 4 Ves. 610; Yarnold v. Wallis, 4 Y. & C. 160; Potter v. Potter, 1 Ves.

437; Gibson v. Montfort, 1 Ves. 485; In re Earl's Trust, 4 K. & J. 673; Doe d. Murch v. Marchant, 6 M. & G. 818; Rowley v. Eyton, 2 Mer. 128; De Bath v. Fingle, 16 Ves. 167; Williamson v. Adams, 1 V. & B. 445. The codicil need not be physically attached to the will. Nor is it ever necessary that the original will shall be read to or by the testator at the date on which he executes the codicil; for if the paper he refers to is properly executed, he will be presumed to have known its contents. Pope v. Pope, 95 Ga. 87, 93. "The codicil," says Lord Ellenborough in Goodtitle v. Meredith, 2 M. & S. 5, on p. 18, "draws the will down to its own date, and makes it operate as if it had been executed in those terms." See also 2 L. R. A. 194.

¹Barker v. Bell, 46 Ala. 216; Witter v. Mott, 2 Conn. 67; Vestry v. Bostwick, 8 App. D. C. 452; Carey v. Baughn, 86 Iowa, 540, 544; Jackson v. Holloway, 7 Johns. (N. Y., 1808), 394, 397; Jackson v. Potter, 9 Johns. (N. Y., 1812), 312, 314; Mooers v. White, 6 Johns. Ch. (N. Y., 1822), 360, 375; Stickney's Will, 52 N. Y. S. 929;

§ 218. When the presumption of constructive republication may be rebutted.—The English Statute of Wills¹ has, to a large extent, relegated the doctrine of republication to the background and shorn it of its importance by the provision which makes a will speak as of the death of the testator, and which causes a residuary or general devise of lands of inheritance to include all the real property to which the testator is entitled at his death in the absence of proof of a contrary intention. But, prior to the enactment of that statute, the rule that the republication of the will by a subsequent codicil would cause a general or residuary clause to carry lands acquired after execution was subject to an exception where the testator in the codicil was shown to have in mind only that portion of his estate which he had devised in his will, as when, after revoking a general devise in his will, he proceeded to dispose of "*his said lands to other persons*."² So the rule is that a republication does not revive a legacy which has been adeemed or satisfied by a portion, even though it contains an express confirmation of the will in which the legacy has been given;³ nor a devise or a legacy which had lapsed by the death of the devisee or legatee during the life of the testator.⁴

§ 219. The effect of re-execution on after-acquired land.—In conformity with the rule that a re-execution or, as it is called in the cases, a republication of the will makes it speak as of the date of republication, all the language of the will which either directly or remotely refers to time is projected into the future and is presumed to mean the time of the re-execution. And as the element of time is, by implication at least, a part of every description, whether of persons or property, it is clear that such language as "all my estate, real and personal," "all my

Love v. Johnston, 12 Ired. L. (N. C., 1859), 134, 189; Musser v. Curry, 3 Wash. C. C. 481; Hatch v. Hatch, 2 Hawy. (3 N. C., 1803), 233; Dunlap v. Dunlap, 4 Dec. (S. C., 1812), 305; Master v. Savage, 1 Ves. Sr. 340; Warner v. Warner, 37 Vt. 356, 368. Parol re-execution seems to be recognized by the earlier cases in Pennsylvania and South Carolina. Harvard v. Davis, 2 Binn. 406, 425; Jack v. Schoen-

berger, 22 Pa. St. 416; Cogdell v. Cogdell, 3 Dec. (S. C.) 346, 367.

¹ 1 Vict., c. 26, sec. 24.

² Bowes v. Bowes, 7 T. R. 432, 2 Bos. & Pul. 500.

³ Monck v. Monck, 1 Ba. & Be. 296; Powys v. Mansfield, 3 My. & Cr. 376; Izard v. Hurst, 2 Freem. 224; Booker v. Allen, 2 R. & My. 270. See *post*, § 453.

⁴ Perkins v. Micklethwait, 1 P. W. 275.

real estate in A.," "all my houses," or "property," or "all my wild lands," or a residuary devise generally, may signify quite a different interest and estate when used at one time from what it may when used at another. The meaning of such terms will vary according as the estate of the person using them is increased or diminished during the interval between the execution and the re-execution of the will. At the common law the rule was that where a testator made a will which contained a general or residuary clause, real property thereafter acquired did not pass thereby, for the reason that he was not seized at the execution of the will. But where the testator made such a will, and subsequently, after the purchase of real property, executed a valid codicil attested so as to pass real estate within the statute, the codicil was a republication of the will, and the will as thus re-executed or republished carried the after-acquired lands by the operation of the general devise in the will, because the language of the will was brought down to the day of the execution of the codicil, and embraced all the real property of the testator of which he was then seized. The codicil was regarded as bringing the will down to date, even though it made no reference to the will and though the papers were not attached, unless a contrary intent appeared.¹

§ 220. **Re-execution of holographic wills.**—In those jurisdictions where by statute holographic wills are valid without witnesses, an unattested writing, though it is holographic, is not a valid re-execution of a holographic will, unless it is valid as a holographic will. Thus, it will not constitute a valid execution of a prior holographic will if it is not wholly written, dated, and signed by the hand of the testator, and in some

¹ *Acherly v. Vernon*, 1 P. Wms. 788, 2 Eq. Ca. Ab. 769, pl. 1, 8 Bro. P. C. Toml. 85; *Barnes v. Crowe*, 4 Bro. C. C. 2. The fact that in the codicil the testator devises a portion of the lands purchased *after* the execution of the will does not prevent the codicil from operating to carry those not specifically devised. *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hulme v. Heygate*, 1 Mer. 285; *Beall v. Cunningham*, 8 B. Mon. (Ky.) 890, 898; *Potter v. Potter*, 1 Ves. Sr. 438; *Piggott v. Waller*, 7 Ves. 98; *Rowley v. Eyton*, 2 Mer. 127; *Goodtitle v. Meredith*, 2 M. & S. 5; *Guest v. Willasey*, 2 Bing. 429; *Bowes v. Bowes*, 2 Bos. & P. 500; *Haven v. Foster*, 14 Pick. (Mass., 1833), 540, 543; *Miles v. Boyden*, 8 id. 216; *Brownell v. De Wolf*, 8 Mason, C. C. 486, 494; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 375; *Musser v. Curry*, 3 Wash. C. C. 482; *Rose v. Drayton*, 4 Rich. Eq. (S. C.) 260, 262.

cases there is an additional requirement that it shall have been deposited among his papers. On the other hand, a holographic will may always be re-executed (upon the principle of incorporation by reference) by a codicil or by another will properly executed, but which is not holographic.¹

¹ Love v. Johnston, 12 Ired. (N. C.) 134, 139; Sawyer v. Sawyer, 7 Jones' L. (N. C.) 134. See *ante*, § 9.

CHAPTER X.

THE REVOCATION OF WRITTEN WILLS.

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| <p>§ 221. The revocation of wills defined.</p> <p>222. The statutory mode of revocation.</p> <p>223. The intention to revoke and the act required by the statute must coincide.</p> <p>224. The testator must possess testamentary capacity to revoke the will—Destruction of will by insane testator.</p> <p>225. Unintentional destruction, or destruction by mistake or accident, is not a revocation.</p> <p>226. Revocatory effects of an incomplete destruction.</p> <p>227. Revocation by tearing or burning—The necessity for the <i>animus revocandi</i>.</p> <p>228. Revocation <i>pro tanto</i> by cancellation or obliteration.</p> <p>229. Cancellation must be properly attested—No revocation <i>pro tanto</i> by an unattested cancellation.</p> <p>230. Presumption as to finality of cancellations in pencil.</p> <p>231. Revocation by canceling or erasing the signature of the testator.</p> <p>232. Presumption of revocation from the disappearance of the will or from its discovery in a mutilated condition.</p> <p>233. The placing of the will among waste papers.</p> <p>234. The competency of the declarations of the testator to strengthen or to rebut a presumption of revocation.</p> <p>235. The revocation of a woman's will by her marriage.</p> | <p>§ 236. Statutes under which marriage revokes a woman's will.</p> <p>237. The irrevocability of a will executed under a power reserved to a married woman.</p> <p>238. Statutory enactments that the marriage of a man shall effect a revocation.</p> <p>239. The revocation of a will implied at common law from marriage and birth of children.</p> <p>240. In the Roman law the birth of a child operated as a revocation—Reasons for the rule.</p> <p>241. Statutory legislation affecting the rights of children omitted from the will.</p> <p>242. What provisions for a child will prevent a revocation.</p> <p>243. The admissibility of parol evidence to rebut the presumption arising from an omission to provide for children in the will.</p> <p>244. Revocation by change in the circumstances of the testator.</p> <p>245. Revocation by parol at common law.</p> <p>246. Attempted revocation by non-testamentary writings.</p> <p>247. The revocation of wills by subsequent wills or codicils—The Statute of Frauds.</p> <p>248. The strict construction of revocation clauses.</p> <p>249. The revocation clause must show a present intention to revoke.</p> |
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| <p>§ 250. The operation of a revocation clause which is void wholly or in part.</p> <p>251. Revocation by an inconsistent disposition of property in a subsequent will or codicil.</p> <p>252. The doctrine of conditional or preparatory revocation.</p> <p>253. Revocation based upon a mistaken assumption or belief of fact.</p> <p>254. The English doctrine of revocation by an invalid conveyance.</p> <p>255. The revocation of the appointment of an executor.</p> <p>256. The question of revocation in the case of several wills of uncertain date.</p> <p>257. When the revocation of a codicil may be presumed from the revocation of a will.</p> <p>258. Insertion of a revocation clause by mistake—Revocation by express words of wills executing powers.</p> | <p>§ 259. The revocation by inconsistent disposition of testamentary appointments.</p> <p>260. Revocatory wills not disposing of property.</p> <p>261. Revocatory effect of the destruction of one of several wills executed in duplicate.</p> <p>262. The effect of the death of a legatee upon a will.</p> <p>263. Revocation not implied from the subsequent insanity of the testator.</p> <p>264. Whether the adoption of a child by the testator will revoke a will.</p> <p>265. Revocation by implication from divorce.</p> <p>266. The revocatory effect of lost wills.</p> <p>267. The effect of alterations by strangers and by persons interested.</p> <p>268. Presumptions as to the time when alterations were made.</p> <p>269. The revival of wills which have been revoked.</p> |
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§ 221. **The revocation of wills defined.**—The revocation of a will means the destruction or annulment of its power as an operative conveyance of either real or personal property, or of both, by or at the direction of the testator, by some act done with an intention to recall its provisions, or by the execution of a later will with that intention.¹

Revocation may be total, where the whole testamentary intention of the testator is annulled, or partial, where the revocation extends to a part only of the instrument. Revocation may be express, as where it is effected in any one of the modes prescribed in the statute, as by tearing, canceling or burning, or by an express clause in terms revoking the will. Revocation is implied where the intention to revoke is inferred from circumstances, as where it is implied by the law from the assumption of new responsibilities by the testator or the imposition of new duties upon him by the law, the proper performance of

¹ *Christmas v. Whinyates*, 3 Sw. & Tr. 81; *In re Woodward*, L. R. 2 P. & D. 206.

which would be inconsistent with the continuing validity of an existing will.

We may instance as examples of the latter species, revocation by the marriage of a single woman, and revocation by marriage and the birth of a child. The several statutes prescribing the modes in which a will may be revoked do not prevent the operation of the doctrine of revocation by implication caused by a change in circumstances. They require that certain formalities shall be complied with in the case of an express revocation; but they recognize the validity of a revocation created by inconsistent circumstances, and leave it to be decided upon general principles of law what those circumstances shall be.¹

§ 222. **The statutory modes of revocation.**—Express revocation as distinguished from implied revocation is a revocation in one of the modes prescribed by statute. The English Statute of Frauds² provides that “no devise in writing of any lands, tenements or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing or obliterating the same by the testator himself, or in his presence and by his direction and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, canceled, torn or obliterated by the testator or at his direction in manner aforesaid, or unless the same be altered by some other will.” The statutes providing for the revocation of wills which have been adopted by the various states follow very closely the provisions of the English Statute of Frauds.

§ 223. **The intention to revoke and the act required by the statute must coincide.**—The performance of any or of all the acts mentioned in the statute does not *alone* constitute a valid revocation. Though the testator, or some one for him and in his presence, shall burn, tear, obliterate or otherwise destroy his will, it will not be revoked, unless *the intention to revoke it was present in the mind of the testator and accompanied the act performed by or for him.* The intention to revoke must always

¹ Warner v. Beach, 4 Gray (Mass., 1855), 162, 163. ² 29 Car. II., c. 3, sec. 6.

be shown. For, says Mr. Jarman,¹ the "mere physical act of destruction is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence, indicating the *animus revocandi* to be wanting. The act of destruction is of uncertain meaning until it is shown that it was accompanied by the intention that it should be a revocation."²

It follows as a consequence that as the act and the intention to revoke must coincide and accompany each other, that the *intention alone, however urgent and fixed*, not accompanied by or resulting in an act of destruction or some act of revocation mentioned in the statute, will not revoke. The Statute of Frauds prescribed that certain modes of revocation must be followed and particular acts done. These acts are classified under four heads: *First*, "burning;" *second*, "canceling;" *third*, "tearing," and *fourth*, "obliterating." And the act of cancellation,

¹ Jarman on Wills, ch. VII, sec. 11, p. 130.

² Miles' Appeal, 68 Conn. 237, 243; Long's Will (Cal.), 2 Pac. R. 491; Patterson v. Hickey, 32 Ga. 156; Pryor v. Coggin, 17 Ga. 444; Wolf v. Bolinger, 62 Ill. 368; Wright v. Wright, 5 Ind. 389, 391; Beauchamp's Will, 4 Mon. (Ky., 1827), 361, 363; Steele v. Price, 5 B. Mon. (Ky., 1844), 58, 61; Doane v. Hadlock, 42 Me. 72; Colagan v. Burns, 57 Me. 499; Rich v. Gilkey (1884), 73 Me. 595, 606; Semmes v. Semmes, 7 H. & J. (Md., 1826), 383, 390; Eschbach v. Collins, 61 Md. 478, 498; Lawyer v. Smith, 8 Mich. 411; Hairston v. Hairston, 30 Miss. 276, 305; Dickey v. Malachi, 4 Mo. (1835), 177; Gardiner v. Gardiner, 65 N. H. 230, 233; Smock v. Smock (1856), 11 N. J. Eq. 156, 158; Mundy v. Mundy, 15 N. J. Eq. 390; Clark v. Smith, 34 Barb. (N. Y.) 150; Dan v. Brown, 4 Cow. (N. Y.) 483; Idley v. Bowen, 11 Wend. (N. Y.) 227; Brailsford v. Johnson, 2 Nott & McC. (S. C., 1820), 272; Means v. Moore, 3 McCord (S. C., 1825), Law, 282, 286; Burns v. Burns, 4 S. & R. (Pa., 1818), 295, 297; Gardner v. Gardner, 177 Pa. St. 218, 220; Pringle v. McPherson, 2 Brev. (S. C., 1809), L. 279, 287; Boyd v. Cook, 3 Leigh (Va.), 32; Perrott v. Perrott, 14 East, 423, 440; Giles v. Giles, L. R. 2 P. & D. 401; Powell v. Powell, L. R. 1 P. & D. 209, 211. "With respect to the revocation of a will by an act of canceling, it is of itself an equivocal act; and in order to make it a revocation it must be shown *quo animo* it was canceled. For, unless that appears, it will be no revocation. As, if a man were to throw the ink upon his will, instead of the sand, though it might be a complete defacement of the instrument, it would be no canceling; or suppose a man, having two wills of different dates by him, should direct the former to be canceled, and, through mistake, the person should cancel the latter, such an act would be no cancellation of the will; or suppose a man, having a will consisting of two parts, throws one unintentionally in the fire, where it is burnt, it would be no revocation of the devises contained in such parts." By Lord Mansfield in *Burtonshaw v. Gilbert*, 1 Cowp. 49, on p. 52. See also note to *Onious v. Tyrer*, 1 P. Wms., p. 345.

tearing or obliteration was not required to be attested.¹ The intention to revoke otherwise than by a subsequent will or writing must be manifested by the doing of some act which is prescribed by statute.²

No great difficulty is experienced where the testator, though he may have intended to revoke his will, neither manifests that intention nor attempts to manifest it in any of the modes which are mentioned in the statute. Having wholly failed to do or to attempt to do *anything*, the mere intention alone does not, of course, constitute a revocation. A more difficult case arises where the testator, intending to revoke his will, attempts to destroy it in a statutory mode, but desists before the act of destruction is complete; or he is prevented from completing

¹This section of the Statute of Frauds, regulating the revocation of wills by an act of destruction, has been very generally adopted and followed by the statutes of the various states. But in England it has been very materially modified by the statute 1 Vict., c. 26, § 20, passed in the year 1837. The act 1 Vict., c. 26, § 20, provides "that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid (that is, by marriage), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed as a will;" or by burning, tearing or otherwise obliterating the same by the testator, or by some person in his presence and by his direction, with an intention of revoking the same. Section 21 provides "that no obliteration, interlineation or other alteration made in any will after the execution thereof shall be valid or have any effect except so far as the words of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of a will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the

signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration and written at the end or some other part of the will."

²Barker v. Bell, 46 Ala. (1871), 216; Goodsell's Appeal, 55 Conn. 171, 10 Atl. R. 557 (putting in a drawer among worthless papers); Smith v. Dolby, 4 Harr. (Del.) 850, 851; Belshaw v. Chitwood, 141 Ind. 377, 381, 40 N. E. R. 908; Runkle v. Gates, 11 Ind. (1858), 75, 100; Hesterberg v. Clark, 166 Ill. 241, 247; Toebbe v. Williams, 80 Ky. (1880), 661; In re Blakemore, 43 La. Ann. 845, 9 S. R. 496; In re Hill, 47 La. Ann. 329, 16 S. R. 819; Hollingsworth v. Sturgis, 21 La. Ann. 450; Boylan v. Meeker, 28 N. J. Eq. (1860), 274; Eyster v. Young, 3 Yeates (Pa., 1803), 511; McCune v. House, 8 Ohio St. (1837), 144; Brown v. Thorndike, 15 Pick. (Mass.) 388; Means v. Moore, 3 McCord (S. C., 1820), 282; White v. Casten, 1 Jones (46 N. C., 1858), L. 197; Kirkpatrick v. Jenkins, 96 Tenn. 85, 88; Marr v. Marr, 2 Head (40 Tenn., 1850), 303; Haines v. Haines, 2 Vernon, 441.

the destruction; or where, directing or requesting another to destroy the will for him, the person so directed deceives him by informing him that his wishes have been complied with, when in fact the will has not been destroyed at all.

Where a blind testator told his daughter to destroy his will, and she preserved it, telling her father that it had been destroyed, which he believed, it was held to be no revocation.¹ So, where a testator who was blind handed his will to a person who was in the same room with him, and requested the latter to throw it on the fire, intending thereby to revoke it, and the person placed another writing on the fire, it was held no revocation, though the testator, smelling the smoke of the burning paper, said that he knew his will was revoked, and expressed his satisfaction thereat.² So, where the testator, lying helpless on a sick-bed, directed his son to burn his will, and the son burned an old letter which the testator thought was his will, it was held that the will was not revoked under the statute.³ And finally, where the testator directed his wife to procure his will and burn it, and she told him she had done so, which was false, though he believed it, the will, having been preserved, was admitted to probate.⁴ In the states of Georgia and Tennessee a different rule has been established. There, a direction by the testator to destroy a will in one of the modes pointed out by the statute, with a present intention to revoke, is a valid revocation, though the will is not in fact destroyed by the party to whom the direction is given.⁵

§ 224. The testator must possess testamentary capacity in order to revoke the will — Destruction of will by insane testator.—The testator must know what he is doing when he

¹ *Boyd v. Cook*, 3 Leigh (Va., 1831), 32, 36-38.

² *Kent v. Mahaffey*, 10 Ohio St. (1859), 204, 212.

³ *Hise v. Fincher*, 10 Ired. (32 N. C., 1849), 139. See also *Card v. Grinnan*, 5 Conn. 164.

⁴ *Mundy v. Mundy*, 15 N. J. Eq. (1863), 204, 212.

⁵ *Pryor v. Coggin*, 17 Ga. (1855), 444, 448; *Ford v. Ford*, 7 Humph. (26 Tenn.) 92, 104; *Smiley v. Gambill*, 2 Head, 164, 167. The principles on

which these cases, where an actual destruction of a will was prevented by a trick and the deceit of the person whom the testator had trusted, sustaining the will and probating it against the intention of the testator, are hard and obviously unjust. They call for the application of equitable principles by which the beneficiaries shall be declared trustees *ex malificio* for those who would have taken in case of intestacy. See *ante*, § 153, and *post*, § 228.

destroys his will. He must understand the effect and nature of the act of tearing, burning or otherwise destroying; and it must be shown to the satisfaction of the court that he did this act, or that he told another to do it, with an intention that the will should be revoked thereby. In other words, it must be shown that he possessed testamentary capacity at the precise time of the destruction, and that the act of destroying the will was deliberate on his part.¹ If a will is found in a mutilated condition among the papers of the testator at the date of his death, it will be presumed to have been revoked by him; and, in the absence of any proof of fixed insanity, he will be presumed to have had sufficient capacity to have revoked it. But if it affirmatively appear that the will was torn or destroyed while the testator was insane, the party claiming that the will is revoked will be compelled to prove that the act was done during the existence of a lucid interval.² Thus where the testator while suffering from delirium tremens,³ or confined in an insane asylum suffering from permanent insanity,⁴ or being undoubtedly insane, though neither judicially pronounced so nor confined in an asylum,⁵ tore up or attempted to tear or otherwise destroy his will, it was held no revocation, as testamentary capacity was absent. And the fact that, after the testator had recovered from his delirium, he regretted what he had done, and expressed satisfaction on being told that his will had been preserved from destruction, is very material to show that the act of destruction was not intended as a revocation.⁶

¹ *Rich v. Gilkey*, 73 Me. 595, 597-601; *Limemeyer v. Brandt* (Iowa, 1898), 77 N. W. R. 493; *Olmstead's Estate* (Cal., 1898), 54 Pac. R. 745; *Idley v. Bowen*, 11 Wend. (N. Y.) 227, 235.

² *Smith v. Wait*, 4 Barb. (N. Y., 1848), 28; *Rhodes v. Vinson*, 9 Gill (Md., 1850), 169, 171; *Ford v. Ford*, 7 Humph. (Tenn.) 92, 104; *Idley v. Bowen*, 11 Wend. 227, 235; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y., 1848), 158; *Schultz v. Schultz*, 35 N. Y. (1866), 653; *Rich v. Gilkey*, 73 Me. 595, 600; *Scruby v. Fordham*, 1 Ad-dams, 74-92.

³ *Brunt v. Brunt*, 3 P. & D. 37, 39 (1873); *Borlase v. Borlase*, 4 Notes Cas. 109, 130.

⁴ *Forman's Will*, 54 Barb. (N. Y.) 274, 298.

⁵ *In re Shaw* (1838), 1 Curt. 905; *In Goods of Downer*, 18 Jurist. 66.

⁶ See cases cited in note, 2, p. 224. "A person who has not testamentary capacity cannot revoke a will in any manner whatever. He can neither make nor unmake a will. A codicil stands upon the same footing as a will. A will legally made stands until legally revoked. It cannot be revoked by any act of destruction, unless the act is done with an intention to revoke; and a person not having testamentary capacity cannot have an intention to revoke a will; he is legally incapable of it. In such

§ 225. **Unintentional destruction, or destruction by mistake or accident, is not a revocation.**—An accidental or inadvertent destruction of a will, either by the testator or another person, not accompanied by the intention to revoke it, will not constitute a valid revocation. Thus, it has been held that if the testator, having executed two wills and desiring to revoke one, destroys the wrong one inadvertently,¹ and dies, believing that he has burned the will he wished to revoke; or if he, believing that his will is invalid, when it is not so, destroys it, and, subsequently learning that he was mistaken, carefully preserves the fragments,² the will is not thereby revoked, but ought to be admitted to probate on satisfactory proof of the accidental character of the act. And, *a fortiori*, if the testator was of unsound mind when he destroyed the will, his act, not being the outcome of his intentional volition, will not effect a revocation.³

The destruction of a will by another person without the direction or authority of the testator, either during his life-time or after his death, and whether it is done with a fraudulent intent or accidentally, is, of course, no revocation. The circumstances attendant upon the accidental destruction being shown by competent evidence, and the contents of the will being satisfactorily proved, the will may be admitted to probate as the last will and testament of the testator.⁴ If the will is destroyed without the consent of the testator, the act of destruction may be a valid revocation if it is ratified by him subsequently. But the ratification must be evidenced by some act from which the court may with reason infer that the original act of destruction was approved by the testator. Mere silence on the part of the testator or a refusal to make a new will is not enough alone from which to imply a ratification.⁵

case the burning of the will can have no effect whatever, provided the contents can be clearly and certainly proved by other evidence. The written instrument may be burnt; the surest and best evidence of the will may be thus destroyed; but the will itself, if a draft of it can be proved, outlives the act of destruction, and the testamentary dispositions stand."

Rich v. Gilkey, 73 Me. (1882), 595, at p. 597.

¹ Burns v. Burns, 4 Serg. & Rawle (Pa., 1818), 295, 297.

² Giles v. Warren, L. R. 2 P. & D. 401, 41 L. J. Prob. 59.

³ See *ante*, § 234.

⁴ See Lost Wills, §§ 270-278.

⁵ Mills v. Millward, 15 Prob. Div. (1889), 20, 21. The destruction of a

§ 226. Revocatory effects of an incomplete destruction.—

The cases involving an incomplete destruction may be classified under three heads. *First*, where the testator directs or requests another person to destroy his will and the latter intentionally neglects to do so.¹ *Second*, where the testator himself attempts to destroy his will, but for some reason changes his intention and desists before the act of destruction is finished. *Third*, where the testator attempts to destroy his will, but, there still being no change of intention on his part, he is prevented from doing so by another, or by his own physical weakness. We will consider cases of the first class, where the testator directs another person to destroy his will. It has been held that where a testator who is unable to destroy his will by reason of blindness, or because of other physical inability, directs another person to burn it, and the other refrains from doing so and preserves the writing intact, falsely representing to the testator that he has burned it, and he believed it, there was no revocation.²

In regard to the second class of cases it may be said that a strong presumption against revocation arises where the testa-

will by the testator, he being under the impression that its revocation would revive a former will which had been expressly revoked by it, does not constitute a revocation where the belief of the testator is erroneous, because the statute requires a re-execution to revive a will once revoked. In the *Goods of Andrews*, L. R. Prob. (1893), 14, 16.

¹ *Ante*, § 223.

² *Boyd v. Cook*, 3 Leigh (Va., 1831), 32; *Clingan v. Mitchelltree*, 31 Pa. St. (1851), 25. Where the sole devisee (the wife of the testator) falsely represented to him that she had destroyed his will by throwing it into a fire, when in fact she had thrown another paper into the fire, the court, on page 36, said: "What safety would there be that a testator's intentions would be regarded and made efficacious if his last will and testament, executed under all the solemnities and formalities of the law, could be

set aside by the mere declarations of a devisee tending to prove fraud; testified to as in the present case by persons interested in the destruction of the will? There is certainly great safety in adhering to the words of the statute; besides which, is there not a want of power to interpolate other words, or to find equivalents for the express words of the statute?"

"No direction given by a testator to another to destroy his will amounts to a revocation. The statute provides that no will shall be revoked but by the testator destroying, canceling or obliterating the same, or causing it to be done in his presence. Mere parol directions given to a person to destroy a will could never satisfy the requisitions of the statute, and to suffer them would be to incur the danger the statute meant to avoid." By the court, in *Boyd v. Cook*, 3 Leigh (Va.), 32. This is discussed fully in § 223.

tor is shown to have *voluntarily desisted from completing an act of destruction* which had been begun with the intention that it should effect a revocation. Such a change in the purpose of the testator is shown where he pauses in his tearing or burning of the will upon the request or remonstrance of a bystander and leaves the work of destruction incomplete. Under such circumstances the degree to which the fabric of the will is destroyed is not material, if it shall appear from all the circumstances that the destruction was voluntarily left unfinished by the testator;¹ and, *a fortiori*, if, after having effected a partial destruction, he carefully preserves the fragments of the will, and states that he is satisfied that things are no worse and that no material damage has been done.²

The cases are not harmonious as to the amount or the degree of destruction which the substance of the written will must be submitted to in order to constitute a revocation. The statutes are silent on this point. Everything depends upon the circumstances of the particular case. If the testator, having the physical power, does *all he can to accomplish the destruction* of his will, and his action is thwarted by the intervention of some third person, or by the non-compliance with his directions by the person to whom he has given them, it seems, according to some of the English cases, that the will is not revoked. Thus, where the testator, having had his will brought to him, cast it in the fire, intending thereby to revoke it, but the will was taken out by a bystander, the principal legatee, who, after refusing to return it to the testator, though importuned to do so, thrust a paper in the fire, stating to the testator that it was the

¹ *Elms v. Elms*, 1 Sw. & Tr. 155, 159-161, 27 L. J. Prob. 96.

² In *Elms v. Elms*, 1 Sw. & Tr. 155, 159-161, 27 L. J. Prob. 96, the testator had nearly torn his will through, but desisted upon the remonstrances of a person present who pointed out the danger of such action. In *Collagen's Case*, 1 Notes Cas. 90, 2 Curt. 832, the testator, in a moment of irritation at the action of the legatee, tore his will in four pieces, and afterwards, repenting of what he had done, told his servant to stitch the

pieces together. In *Doe v. Perkes*, 3 B. & A. 489, the testator upon provocation by a legatee tore his will partly, but desisted on the remonstrance of a bystander and fitted the pieces together again, expressing his satisfaction that it was no worse. In *Collagen v. Burns*, 57 Ma. 499, after the will had been torn in pieces by the mother of the testator, the latter fitted the pieces together and pasted them on a piece of paper. In all these cases the will was held *not* to have been revoked.

will, which statement was false, the court held that the will had not been revoked.¹

On the other hand, where the testator threw his will into the fire, and afterwards, when his back was turned, his wife took it out and concealed it, and it was burned in three places, but not a letter, word or figure was destroyed, nor was it in any way disfigured, the court held that the will was revoked.²

The statute requires that the burning shall result in the destruction of the will. If some material portion of the substance of the will is burned as a result of the intentional act of the testator, the will is revoked, though by reason of some fraudulent intervention the destruction by burning is not complete.³

A question of the finality of the act of destruction constituting a revocation arises where the testator makes a number of interlineations and erasures in his will and gives it to counsel, who may perhaps make other memoranda of alterations, and

¹ Doe d. Reed v. Harris, 6 Adol. & Ellis, 209, 2 Nev. & P. 615. In this case only the cover of the will was singed. The statute requires that the will shall be burned. "To hold that it (the mere singeing) was so, would be saying that a strong intention to burn was a burning. There must be, at all events, a partial burning of the instrument itself; I do not say that a quantity of words must be burned, but there must be a burning of the paper on which the will is." Patteson, J., in Doe d. Reed v. Harris, *supra*. See also the case of Hise v. Fincher, 10 Ired. (N. C. 1849), Law, 139, the circumstances of which were very similar. If the statute requires an actual destruction, an attempt to destroy which is not consummated is not enough. Thus, a testator placed his will with some kindlings in a stove, intending that it should be burned when the fire was ignited. A devisee, for the purpose of preventing its destruction, but without the knowledge or consent of the testator, and while he was out of the room, took the will from the stove before it was in any

way injured by the fire and secreted it, leaving an envelope in which it was inclosed to be burned. The court held that, the intention and the act not coinciding, there was no revocation. Graham v. Burch, 47 Minn. 171, 174, 49 N. W. R. 697.

² White v. Casten, 1 Jones (N. C., 1853), Law, 197, 200. See *ante*, § 224.

³ White v. Casten, 1 Jones (N. C., 1853), Law, 197, 200. "The slightest act of tearing or burning, if accompanied by satisfactory evidence drawn *aliunde* of the intention to revoke, will satisfy the statute." Compare Johnson v. Brailsford, 2 Nott & McC. (N. C.) 272. But it is very clear that, though the testator may intend to revoke the will, it will not be revoked where, though intending to burn or tear it, he fails absolutely to do so to any extent whatever. *Ante*, § 224. See generally 4 Kent, 517; Dan v. Brown, 4 Cow. (N. Y.) 483, 490; Card v. Grinan, 5 Conn. (1823), 164; Bethel v. Moore, 2 Dev. & Bat. (18 N. C., 1837), 311; Bennett v. Sherrod, 3 Ired. (26 N. C., 1843), 303; Bibb v. Thomas, 2 Black. 1043; Brown's Will, 1 B. Mon. (Ky.) 56.

who takes the instrument, thus altered, as a guide for a new will, which is drawn up but never executed by the testator because of his extreme illness or death. In the English ecclesiastical courts it was decided that under such circumstances the will was revoked.¹ But a contrary conclusion was reached by the supreme court of the state of Mississippi;² and it has also been held that interlineations made by a lawyer at the dictation of the testator, expressly for his guidance in enabling him to draw a new will, which was never drawn because the testator was unable, on account of physical weakness, to complete his instructions, are not a revocation.³

§ 227. **Revocation by tearing or burning — Necessity for the animus revocandi.**—Under the Statute of Frauds, and under those statutes which, in the United States, are modeled upon it, tearing the will, even to the slightest extent, is a good revocation, if accompanied by the intention to revoke.⁴ So, in an early case in Massachusetts, it was held that tearing a seal off the will, with an intention to revoke, was a valid revocation, though, of course, attaching a seal was not essential to the validity of the will.⁵ The Statute of Wills, 1 Vict., c. 26, did not alter or modify the mode of revocation by tearing or burning. Hence the English decisions subsequent to the passage of that statute are of value in determining the meaning of provisions regulating revocation by the tearing of the paper upon which the will is written.

Cutting the will with a knife or shears is equivalent to tearing it, and, however slight, is a revocation, if done *animus revocandi*. In order that cutting or tearing shall be a revocation, it is never essential that the whole writing shall be cut or torn in many pieces. If the testator shall cut off his name subscribed at the end⁶ it is enough. If a will is found deposited among the papers of the testator at his death, with the signature of the testator cut, torn or scratched off, and it appears

¹ In the Goods of Applebee, 1 Hagg. 143.

² Bohanon v. Walcott, 1 How. (2 Miss., 1836), 336, 338.

³ Means v. Moore, 8 McCord (S. C., 1828) L., 173, 175.

⁴ Bibb d. Male v. Thomas, 2 W. Bl. 1043.

⁵ Avery v. Pixley, 4 Mass. (1808), 460. See ante, § 182.

⁶ Hobbs v. Knight, 1 Curteis, 768; In re Gullan, 1 Swabey v. Tristram, 23; In re Lewis, 1 id. 81; In re Simpson, 5 Jur. (N. S.) 1366.

that the will, when last seen, was in the possession of the testator, it will be presumed that the tearing, cutting or erasure was done by him and with an intention to revoke.¹ The same rule is applicable where a will is found under the same circumstances with the names of the witnesses erased.² But parol evidence is always admissible to rebut this presumption; and in a recent English case where the witnesses, after attesting the will, having learned that it disposed of a very large fortune, and fearing the trouble and expense which a possible lengthy litigation might cause them, procured the will and erased their signatures, the court held that the will was not revoked thereby, though deciding that it was invalid upon other grounds.³ It is necessary that the act of tearing or of cutting up the will shall be done *animo revocandi*, for, if otherwise, it is not a valid revocation. If the testator tears his will by mistake, or while insane, or cuts it up under a mistaken impression that it is some other paper, the mere tearing or cutting will not amount to a revocation, as the intention to revoke is not present.⁴ And evidence is always admissible to explain why a will was torn, and to show, where it is found after the death of the testator in a torn and ragged condition, that its peculiar condition was, or was not, the result of accident or design.⁵

§ 228. Revocation pro tanto by cancellation or obliteration.—The extent to which and the manner in which a will may be revoked by the cancellation or obliteration of all or of part of it depend wholly upon the precise language of the statute existing at the date of the obliteration or cancellation. The statutes are to be strictly construed, and a substantial, if not a strict, compliance with their provisions is required in every in-

¹ In the Goods of Morlin, L. R. Prob. Div. (1887), 141, 142; Bell v. Fothergill, L. R. 2 P., D. & M. 148, and cases cited in note 6, p. 312.

² Evans v. Dallow, 31 L. J. Prob. 128. And see Appeal of Evans, 58 Pa. St. 238, 247.

³ Margary v. Robinson, L. R. Prob. Div. (1886), 8, 13.

⁴ §§ 224, 225, *ante*.

⁵ In re Tozer, 2 Notes Cas. 11; In re Hannan, 14 Jur. 558; Giles v. Warren, L. R. 2 P. & D. 401; Clarke v.

Scripps, 16 Jur. 783; Bigge v. Bigge, 9 Jurist, 192, 3 Notes Cases, 601. If the will is written on several sheets of paper, each of the sheets being subscribed by the testator, it would seem, according to the English cases, that cutting or tearing off any of the signatures will work a total revocation. In re Gullan, 1 S. & Tr. 23, 27 L. J. Prob. 15; Gullan v. Grove, 26 Beav. 64; Williams v. Tiley, Johns. (Eng.) 530.

stance. The English Statute of Frauds permitted a revocation *pro tanto* by the testator himself canceling or obliterating a devise, or by some one else doing so under his direction. And the statute did not require that the obliteration or cancellation, whatever its form, should be attested. Construing this provision of the Statute of Frauds, the English courts held that the testator might revoke a particular devise by cancellation, either by drawing lines through it in ink or pencil, or merely through the name of the devisee, and that such a cancellation, though unattested, and though the name of the devisee was still legible, was a complete revocation of the will so far as he was concerned, though the remainder of the will was absolutely valid and unrevoked.¹

§ 229. Cancellation must be properly attested — No revocation *pro tanto* by an unattested cancellation.— But in England and in America at the present day, under the statutes, an unattested cancellation of a legacy is not a revocation *pro tanto*. Generally a cancellation, obliteration or erasure made after the execution of the will,² which does not in fact destroy some portion of the material substance of the will, does not constitute a valid revocation either *in toto* or *pro tanto*, unless it is executed in the manner required by the statute for the proper execution of a will. In order that an erasure shall operate as a revocation it must be complete. If the cancellation falls short of a complete obliteration, and, while crossing out the name of a legatee or some other material portion of the will, leaves it legible, the alteration is invalid as a revocation unless it is properly attested.³

In some of the cases a rather extensive meaning is given the

¹ See *McPherson v. Clark*, 3 Bradf. 419; *Roberts v. Rounds*, 3 Hagg. 548; (N. Y.) 92; *Kirkpatrick v. Kirkpatrick*, 22 N. J. Eq. (1872), 463, 465; *Burkett v. Burkett*, 2 Vern. 498; *Sutton v. Sutton*, Cowp. 812; *Mence v. Wright v. Wright*, 5 Ind. (1854), 389; *Mence*, 18 Ves. 350; *Martins v. Gardner*, 8 Sim. 73; *Francis v. Grover*, 5 Wells v. Wells, 4 T. B. Mon. (20 Ky., 1827), 152; *Tudor v. Tudor*, 17 B. Mon. Hare, 39; *In the Goods of Woodward*, (56 Ky., 1856), 883; *Wheeler v. Bent*, L. R. 2 P. & D. 206. 7 Pick. (Mass., 1838), 61; *In re Penniman*, 20 Minn. (1873), 245; *Stover v. Kendal*, 1 Cold. (41 Tenn., 1861), 557; *Cogbill v. Cogbill*, 2 H. & M. (Va., 1808), 467; *Larkins v. Larkins*, 3 Bos. & P. 16, 21, 22; *Short v. Smith*, 4 East,

² *Post*, § 268.
³ *Clark v. Smith*, 34 Barb. (N. Y., 1861), 140, 143; *Gardiner v. Gardiner*, 65 N. H. 230, 19 Atl. R. 651; *Wolf v. Bollinger*, 62 Ill. (1872), 368; *Dixon's Appeal*, 55 Pa. St. 424, 427; *Wells v.*

word "cancellation." It is certainly clear that this word, as it is used in the statute regulating revocation, does not have its primary meaning of drawing or stamping lattice-work lines on the face of an instrument. It does not have such a meaning as regards deeds and notes, and *any* writing, whether of words, arbitrary symbols or lines, if placed there *bona fide* and with an intent to destroy, is enough. The fact that this word is collocated with "obliteration" and "destroying" does not require us to take it in its literal sense of drawing crossed lines upon the paper, but it means any act done to the writing itself which is regarded as a cancellation in the case of other writings.¹

If the mode of cancellation adopted by the testator is contrary to the statutory requirements and invalid, as by cancelling a legatee's name, or by drawing lines through a dispositive clause, leaving the same unattested, the alteration will be wholly disregarded and treated as non-existent. The whole will, including the portions ineffectually attempted to be revoked, will be admitted to probate if the part crossed out remain legible, or if it can be read by means of extrinsic evidence.²

Wells, 4 B. Mon. (Ky., 1843), 152, 155; Doane v. Hadlock, 42 Me. (1856), 72, 75; Martins v. Gardiner, 8 Sim. 73; Miles' Appeal (Conn.), 36 Atl. R. 39; Law v. Law, 83 Ala. 482, 3 S. R. 752; Gay v. Gay, 60 Iowa (1882), 416, 418, 14 N. W. R. 238; Damman v. Damman (Md., 1893), 28 Atl. R. 743; Succession of Muh, 35 La. Ann. 394, 48 Amer. Pro. R. 242; Bigelow v. Gillingott, 133 Mass. (1882), 102; Townshend v. Howard, 86 Me. (1893), 283, 288; Giffin v. Brooks, 48 Ohio St. (1891), 211, 31 N. E. R. 743; In re Ramsay, 13 Pa. Co. Ct. R. 135; In re Godfrey, 1 Reports, 484, 69 L. Times, 22; In the Goods of Taylor, 63 Law Times, 230; In the Goods of Leach, 63 Law Times, 111. Where the name of an attesting witness, who was also an executor, was erased, the court directed it to be restored, both as an executor and as an attesting witness. In Goods of Greenwood (1892), Prob. 7.

¹ Evans' Appeal, 58 Pa. St. (1868), 233, 245.

² In re Simrell's Estate, 154 Pa. St. 604, 32 W. N. C. 436; Townley v. Watson, 3 Curteis, 761, 768; In the Goods of Ibbetson, 2 Curt. 337, 338; In re James, 1 Sw. & Tr. 238, 239; In re Parr, 29 L. J. Prob. 70, 6 Jur. (N. S.) 56; In re Harris, 1 Sw. & Tr. 536; Soar v. Dolman, 3 Curt. 121. Parol evidence is always received to show the original words or figures on the writing before the attempted erasure or obliteration. In re McCabe, L. R. 3 P. & D. 94. See *post*, § 252. "Now it is perfectly true that in legal contemplation a will may be canceled without being revoked. The cancellation itself is an equivocal act, and, in order to operate as a revocation, must be done *animo revocandi*. A will therefore canceled by accident or mistake . . . is not revoked. . . . Hence . . . the cancella-

§ 230. **Presumption as to finality of cancellation of legacies in pencil.**—The cancellation of lines in a will made in lead pencil is as effectual as a cancellation in ink. The English cases regard pencil cancellations as presumptively deliberative and not final, and require the party claiming that the will is partially revoked by them to rebut this presumption by satisfactory evidence.¹ The American cases recognize no presumption that cancellations or alterations in lead pencil are deliberative and not final. If, as has been repeatedly held, signatures to wills or the instruments themselves written wholly in lead pencil are *prima facie* valid, it is absurd not to give the same effect and operation to cancellations in pencil as to cancellations in ink. The true rule is that the cancellation of a will in lead pencil is only one fact to be considered in determining the effect of the cancellation and the intention with which it was made.

Where a will is produced with lead-pencil cancellations, it will be presumed that they were done by the testator *animo revocandi*, and it is upon the party claiming that they were deliberative and not final to establish that fact.² Where a testator executed two wills, the latter of which contained a printed revocation clause, and the testator had struck this out with a pencil, probate was granted of both wills, omitting the words of revocation from the second will.³

tion of a will does not, necessarily, infer any intentional abandonment of the dispositions contained in or consequently any revocation of it. At the same time it is obvious that this is the ordinary inference, deducible from every act of cancellation, . . . and in order to bar its application to any particular case of cancellation, two things at least are requisite: first, it must be proved by indisputable evidence that the canceled paper once existed as a finished will; secondly, it must be shown, by evidence equally indisputable, that the testator adhered to it throughout, in mind and intention, notwithstanding its revocation." By Sir John Nichol, in *Thynne v. Stanhope*, 1 *Adams*, 52, 2 *Eng. Ecc. R.* 23.

¹*Mence v. Mence*, 18 *Ves.* 348; *Francis v. Grover*, 5 *Hare*, 38, 39, 47; *In re Hall*, L. R. 2 P. & D. 256; *Hawks v. Hawks*, 1 *Hagg.* 321, 324; *Edwards v. Astley*, 1 *id.* 490, 495; *Ravenscroft v. Hunter*, 2 *id.* 68, 71; *Parkin v. Bainbridge*, 3 *Phillimore*, 321, 322; *In re Adams*, L. R. 2 P. & D. 367, 368; *Gan v. Gregory*, 3 *De Gex, M. & G.* 780; *Lavender v. Adams*, 1 *Add.* 409.

²*Tomlinson's Appeal*, 19 *Atl. R.* 482, 25 *W. N. C.* 447, 133 *Pa. St.* 245, 248. In this case a list of legatees having their names crossed in pencil, found among the papers of the testator, was received as evidence to show the meaning of pencil cancellations in the will.

³*In Goods of Tonge*, 66 *Law Times* (N. S.), 60. In Maine a will may be

§ 231. **Revocation by canceling or erasing signature of the testator.**—Erasing the name of the testator or crossing it with lines may, if it is done *animo revocandi*, be a revocation. So, where the statute permits a will to be revoked by “cancellation or otherwise destroying,” it has been held that a will which was found with the signature of the testator carefully crossed by lines drawn through it, either with pen and ink or pencil,¹ may be presumed to have been revoked. It is for the proponent to rebut this presumption.² If the will thus mutilated is found in the possession of the testator at his death, and when last seen was in his possession, the erasure will be presumed to have been his act. But in England a will found in the possession of the testator at his death with the names of the witnesses canceled with ink and the name of the testator erased, apparently with a knife, but all still legible, was held not to have been revoked.³

§ 232. **Presumption of revocation from the disappearance of the will or its discovery in a mutilated condition.**—Where a will which is proved *never to have been out of the possession of the testator* is found in his possession at his death in a mutilated, torn or partly destroyed condition, the mutilation or destruction will be presumed to have been done by the testator, and it will be presumed that it was done *animo revocandi*. Under such circumstances a fraudulent destruction will not be presumed. Parol evidence, consisting of the statements of the testator subsequent to the execution of the will, will be received, on the one hand, to strengthen this presumption of revocation, and, on the other, to show either that the destruction was not done by the testator, or, if by him, that it was done *non animo revocandi*. And all declarations are received, whether contemporaneous with the act of destruction or subsequent

partly revoked by the testator crossing out a legacy with a pencil. *Townshend v. Howard*, 29 Atl. R. 1077, 86 Me. (1891), 285, 288; *Woodfill v. Pat-ten*, 76 Ind. 575, 40 Am. R. 259.

¹ See §§ 228, 229.

² *Townshend v. Howard*, 86 Me. (1891), 285, 288, 29 Atl. R. 1077; *In re Brookman*, 11 Misc. R. 675, 33 N. Y. Supp. 575; *In re Philp's Will*, 19 N.

Y. Supp. 13; *Olmsted's Estate* (Cal., 1898), 54 Pac. R. 745; *Woodfill v. Pat-ten*, 76 Ind. 575, 40 Am. Prob. R. 259; *In re White*, 25 N. J. Eq. (1874), 501; *In re Woods*, 11 N. Y. Supp. 157, 158; *Succession of Muh*, 35 La. Ann. 242.

See § 234, *post*.

³ *In re Godfrey*, 1 Reports, 484, 69 Law Times, 22.

thereto.¹ Thus the declarations of the testator manifesting good will towards the beneficiaries named in the will or showing *his* adherence to its provisions, as when, for example, he says he is satisfied he made it, and that everything in it is to his satisfaction, may be received to rebut a presumption of revocation arising from the fact that the will is found in his possession at his death in a mutilated condition.²

The same presumption as to the revocation of a will which is proved to have been executed, and which, when last seen, was in the possession of the testator, arises where at his death it *cannot be found at all* among his papers after a diligent search. If the will when last seen in his possession was intact and it has subsequently disappeared, it will be presumed that he destroyed it with an intention to revoke, rather than that it was destroyed by some one else, and the testator's declarations are admissible to strengthen or to rebut this presumption.³

¹ Patterson v. Hickey, 32 Ga. (1861), 156; McBeth v. McBeth, 11 Ala. (1847), 596; Wolf v. Bollinger, 62 Ill. 368; McDonald v. McDonald, 142 Ind. 55, 41 N. E. R. 336; Beauchamp's Will, 4 Mon. (Ky., 1827), 361; Collogan v. Burns, 57 Me. (1870), 449; Lawyer v. Smith, 8 Mich. 411, 424; Harring v. Allen, 25 Mich. (1872), 505; Dickey v. Malachi, 6 Mo. (1839), 177; Smock v. Smock, 11 N. J. Eq. (1856), 157; Betts v. Jackson, 6 Wend. (N. Y.) 173; Dan v. Brown, 4 Cow. (N. Y., 1825), 483; Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. R. 209; Boudinot v. Bradford, 2 Yeates (Pa., 1801), 170; Durant v. Ashmore, 2 Rich. (S. C., 1845), 184; Smiley v. Gambill, 2 Head (39 Tenn., 1858), 164, 167; Ford v. Ford, 7 Humph. (26 Tenn., 1846), 92, 104. And see also cases in note 3, this page.

² Patterson v. Hickey, 32 Ga. 156; In re Johnson, 40 Conn. (1873), 587; Dennison's Appeal, 29 Conn. 402; Noel v. Patton, 40 Pa. St. 484; Behrens v. Behrens, 47 Ohio St. 323, 333; Paulton v. Paulton, 4 Jur. (N. S.) 341, 1 Sw. & Tr. 55; Whitely v. King, 112 E. C. L. 756; Finch v. Finch, L. R. 1

P. & D. 371; Keen v. Keen, L. R. 3 P. & D. 105.

³ McBeth v. McBeth, 11 Ala. 596; Snider v. Burks, 84 Ala. (1887), 53, 4 S. R. 53; Weeks v. McBeth, 14 Ala. (1848), 474; Dawson v. Smith, 3 Houst. (Del., 1866), 335; Johnson's Will, 40 Conn. 587, 588; Boyle v. Boyle, 42 N. E. R. 140, 158 Ill. 228; Mercer v. Mercer, 14 Bush (77 Ky., 1879), 434, 438, 447; Minor v. Guthrie (Ky.), 4 S. W. R. 179; Steele v. Price, 5 B. Mon. (Ky.) 58, 61; Davis v. Sigourney, 8 Metc. (Mass.) 487, 488; Betts v. Jackson, 6 Wend. (N. Y., 1830), 173, 181; Idley v. Bowen, 11 Wend. (N. Y., 1833), 227, 233; Holland v. Ferris, 2 Bradf. (N. Y., 1853), 334; Hutch v. Sigman, 1 Dem. (N. Y.) 519; Hard v. Ashley, 34 N. Y. Supp. 583, 88 Hun, 103; Collyer, 110 N. Y. 486; Bulkley v. Redmond, 2 Bradf. (N. Y., 1853), 281, 284; Collogan v. Burns, 57 Me. 449, 455; Johnson v. Brailsford, 2 Nott & McCord (S. C.), 272; Behrens v. Behrens, 47 Ohio St. 323, 331, 25 N. E. R. 209; Foster's Appeal, 87 Pa. St. 67; Deave's Appeal, 140 Pa. St. 242, 27 W. N. Cases. 482, 21 Atl. R. 395; Gardner v. Gardner, 177 Pa. St. 218, 219, 35 Atl. R. 558;

§ 233. **The placing of a will among waste papers.**—The deposit by the testator of his will among worthless papers but in a secure place, where it is apparently abandoned by him, though found undefaced and intact at his death, is not a circumstance by which the slightest inference of a revocation can be created.¹ The whims and caprices of the testator in disposing of his papers in novel or unusual places cannot be regarded as indicating any intention to revoke, for the statute clearly points out by what acts of destruction a will may be validly revoked, and concealing it in a secret place is not one of them.²

§ 234. **The competency of the declarations of the testator to strengthen or to rebut presumption of revocation.**—The oral statements of the testator, or the written, if not executed according to the statute, neither constitute a revocation, nor are they admissible as direct evidence to show that the testator revoked his will. Where the statute clearly provides a method of revocation, by destruction, or by a subsequent testamentary writing, a statement by the testator to the effect that he had revoked a will, in any one of the modes prescribed, is not receivable where its sole purpose is to prove that fact.³ And the oral statements of the testator, whether subsequent or of the *res*

Jones v. Murphy, 8 Watts & S. (Pa., 1844), 275, 301; Legare v. Ashe, 1 Bay (S. C.), 457, 464; Brown v. Brown, 10 Yerg. (Tenn., 1836), 84, 89; Appling v. Eades, 1 Gratt. (Va., 1844), 286, 292; Minkler v. Minkler, 14 Vt. 125, 127; Dudley v. Wardner, 41 Vt. 59, 61; In re Steinke's Estate (Wis.), 70 N. W. R. 61; Colvin v. Fraser, 2 Hagg. 266, 325, 4 Ecc. R. 118; Sugden v. Lord St. Leonards, L. R. 1 P. D. 154, 217, 17 Moak Eng. R. 511, 523; Welch v. Phillips, 9 Moo. P. C. C. 299; Cutts v. Gilbert, 9 Moo. P. C. C. 131; In re Shaw, 1 Sw. & Tris. 62; Finch v. Finch, L. R. 1 P. & D. 371; Tagart v. Squire, 1 Curt. 289; Wargent v. Hollings, 4 Hagg. 245; Lillie v. Lillie, 3 id. 184.

¹Succession of Blakemore, 43 La. Ann. 845, 848, 9 S. R. 496; Succession of Hill, 47 La. Ann. 329, 331, 16 S. R. 819.

²State v. Adams, 23 La. Ann. 72.

³Slaughter v. Stevens, 3 S. E. R. 719, 81 Ala. 48; Comstock v. Hadlyme, 8 Conn. 263; Perjue v. Perjue, 4 Iowa. 520, 523; Gay v. Gay, 60 Iowa (1882), 415, 420; Dickie v. Carter, 42 Ill. (1866), 376; Colloghan v. Burns, 57 Me. 449, 470 et seq.; Lawyer v. Smith, 8 Mich. 411, 412; Wittman v. Goodhand, 26 Md. (1866), 95; Waterman v. Whitney, 11 N. Y. 157, 162; Jackson v. Kniffen, 2 Johns. (N. Y., 1806), 31; Lewis v. Lewis, 2 Watts & S. (Pa., 1841), 455; Boudinot v. Bradford, 3 Yeates (Pa., 1798), 170; Hylton v. Hylton, 1 Gratt. (Va., 1844), 161, 162; Stevens v. Van Cleve, 3 Wash. C. C. (1819), 465; Provis v. Reed, 5 Bing. 43; Staines v. Stewart, 8 Jur. (N. S.) 440; Doe v. Palmer, 16 Q. B. 747. The declarations of the testator are not admissible to prove that he executed

gestæ, are never admissible to raise a presumption of revocation in the case of the doing of an act which does *not, under the statute, constitute a revocation*, even though such act was done with the intention to revoke. But the general rule of evidence, that oral statements are competent when the mental state of the person who utters them is material, must not be lost sight of. If, therefore, the testator is proved to have performed any act which *would have constituted a revocation of the will if it was accompanied by an intention to revoke*, his statements accompanying that act are admissible as a part of the *res gestæ* to show his intention to revoke or the absence of this intention.¹

Thus, where the testator tears or cuts up his will, or throws it in or upon the fire, or directs or permits another to do so in his presence, everything he says or does which may legitimately be regarded as within the *res gestæ* is relevant. His contemporaneous and explanatory declarations may be proved. But what he says subsequently, as it constitutes no part of the *res gestæ* of revocation, is not admissible. Nor are the declarations of the testator ever competent to show an intention to revoke, if the act which they accompany does not, even when it is done with such intention, constitute a revocation.² Where

his will in duplicate, and that he destroyed one part *animo revocandi*. *Atkinson v. Morris* (1897), Prob. 40.

¹ *Gay v. Gay*, 60 Iowa (1882), 415, 420, 14 N. E. R. 238; *Patterson v. Hickey*, 32 Ga. 156; *Steele v. Price*, 5 B. Mon. (Ky., 1844), 58; *Colloghan v. Burns*, 57 Me. 449, 460 et seq.; *Townsend v. Howard*, 86 Me. (1894), 235, 290; *Harring v. Allen*, 25 Mich. (1872), 505; *Lawyer v. Smith*, 8 Mich. (1860), 411, 412; *Waterman v. Whitney*, 11 N. Y. 157, 162; *Betts v. Jackson*, 6 Wend. (N. Y.) 173; *Dan v. Brown*, 4 Cow. (N. Y.) 483; *In re Ladd*, 60 Wis. 187, 199. Thus a statement of the testator is not admissible to show that a partial revocation was intended where the statute requires that all partial revocations shall be effected either by a new will or a codicil. *Law v. Law*, 83 Ala. 432, 3 S. R. 752. *Cf. Batchellor's Succession*,

48 La. Ann. 278, 19 S. R. 283. A statement by the testator that his will had been burned or otherwise destroyed at his direction by another person, coupled with the admission by that person that he or she had been directed to destroy it, but that the instructions of the testator had been disobeyed, is not admissible to prove a revocation, for no act of destruction is proved or admitted from which any presumption of a revocation may arise. *Boyd v. Cook*, 3 Leigh (Va.), 32; *Clingan v. Mitchell-tree*, 31 Pa. St. 25. Mere expressions of an intention to make a will in the future which shall revoke one existing, if admissible at all, are never sufficient to constitute a revocation. *Rife's Appeal*, 1 Atl. R. 226, 110 Pa. St. 232.

² *Waterman v. Whitney*, 11 N. Y. 157, 162; *Jackson v. Kniffen*, 2 Johns.

the declarations of the testator accompanying an act which may or may not be a revocation, according to the intention, are competent to strengthen the presumption that it is an act of revocation, they are equally competent to negative or rebut that presumption.¹

§ 235. The revocation of a woman's will by her marriage.

The will of a *feme sole* was at common law absolutely revoked by her subsequent marriage, for the reason that upon her marriage all her rights in and to her personal property and to the income of her real estate were merged into the estate of her husband.² The woman after her marriage, on common-law principles, *ipso facto* lost all capacity to dispose of such property by will on account of the peculiar rights of control and ownership which her husband acquired by the marriage. Hence, because she had no longer the capacity to make a will, she could not consistently be permitted to revoke one. Her will, executed before her coverture, having thus, by the marriage, lost the revocability which was its necessary accompaniment if it was to continue as a will, was regarded as void by the law.

For, if an ante-nuptial will was not, by implication, revoked by the marriage, it would be irrevocable because of the lack of testamentary capacity after marriage on the part of the testatrix. This is contrary to the nature of a will, which must always be revocable until the death of the person who made it.³

The presumption of revocation arising from the marriage of a *feme sole*, being based upon the theory that the will must be revoked of necessity, is no longer recognized where a married

(N. Y.) 31; *Calman v. Van Harke*, 33 Atl. R. 493; *Morton v. Onion*, 45 Vt. Kan. (1885), 333, 338; *Mooney v. Olson*, (1872), 145, 153; *In re Carey*, 49 Vt. 22 Kan. (1879), 69; *Staines v. Stewart*, (1877), 236, 250; *Ward's Case*, 70 Wis. 8 Jur. (N. S.) 440; *Shallcross v. Palmer*, (1887), 251, 255; 4 Kent, 512; *Forse's Case* (1589), 4 Co. 600, 2 Coke, 439; 16 Q. B. 747.

¹ *Collogan v. Burns*, 57 Ma. 449.

² *Black. Com.*, § 433.

³ *Tyler v. Tyler*, 19 Ill. 151 (1857); *Duryea v. Duryea*, 85 Ill. (1877), 41; *Colcord v. Conrey* (Fla.), 23 S. R. 561; *Warner v. Beach*, 4 Gray (Mass., 1855), 162, 163; *Fransen's Appeal*, 26 Pa. St. (1856), 204, 210; *Walker v. Walker*, 34 Pa. St. (1859), 438; *In re Craft's Estate*, 164 Pa. St. (1894), 523, 525, 30 Atl. R. 493; *Morton v. Onion*, 45 Vt. (1872), 145, 153; *In re Carey*, 49 Vt. (1877), 236, 250; *Ward's Case*, 70 Wis. (1887), 251, 255; 4 Kent, 512; *Forse's Case* (1589), 4 Co. 600, 2 Coke, 439; *Cotter v. Laver*, 2 P. W. 624; *Doe v. Staple*, 3 T. R. 384. The fact that the wife survives the husband does not alone revive the will. *Hodsden v. Lloyd*, 2 Bro. C. C. 533, 534; *Long v. Aldred*, 3 Add. 48; *Plowden*, 343a; *Warner v. Beach*, 4 Gray (70 Mass., 1855), 162, 163; *In re Carey*, 49 Vt. 236, 250.

woman has full capacity to make and revoke wills during her coverture. *Cessat ratio, cessat lex*; for the law will do nothing in vain. If a wife has, during marriage, the power to devise and bequeath to the same extent as though she were single, the law will not uselessly presume the revocation of a will made when she was single.¹ In some of the states this reasoning is not recognized, and it is accordingly held that a will of a single woman is still revoked by her marriage, though she may enjoy by statute the rights of a *feme sole*. This is the law in Massachusetts, where the statute expressly provides that a revocation may take place by implication arising from a subsequent change in the condition or the circumstances of the testator.²

§ 236. Statutes under which marriage revokes a woman's will.—In many states it is expressly provided by statute that the will of a *feme sole* shall be revoked by her marriage, though by statute a woman has power to execute a valid will during coverture. This is the law in Alabama,³ Arkansas,⁴ California,⁵ Indiana,⁶ Missouri,⁷ and New York.⁸ A statute providing that the marriage of the *testator*, subsequent to the execution of his will in which no provision is made in contemplation of the marriage, shall be a revocation of the will, applies to a woman's will, the word "testator" including "testatrix" as well.⁹ And

¹ In *re Tuller*, 79 Ill. (1875), 99; *Roane v. Hollingshead*, 25 Atl. R. 307, 76 Md. 369; *Smith v. Clemson* (Del., 1880), 6 Houst. 171; *Emery's Appeal*, 81 Me. (1889), 275, 277, 17 Atl. R. 68; *Noyes v. Southwick*, 55 Mich. (1884), 173, 174, 54 Am. R. 359; *Morey v. Sohler*, 63 N. H. (1885), 507, 2 N. E. R. 274; *Fellows v. Allen*, 60 N. H. (1881), 439; *Hoitt v. Hoitt*, 63 N. H. (1885), 475; *Webb v. Jones*, 36 N. J. Eq. (1882), 163; *Carey's Estate*, 49 Vt. (1877), 236, 250; *Morton v. Onion*, 45 Vt. (1872), 145, 153; *Ward's Estate*, 70 Wis. (1887), 250, 255, 35 N. W. R. 781; *Lyons' Will* (Wis.), 71 N. W. R. 362. "It is extremely clear that no such will made by a *feme covert* can bind after the marriage, because it is contrary to the nature of the instrument, which must be ambulatory during the life of the testator; and as by marriage she disables herself from making any other will, the instrument ceases to be of that sort and must be void." By Lord Chancellor Thurlow in *Hodden v. Lloyd*, 2 T. R. 695.

² *Swan v. Hammond*, 138 Mass. 45, 47; *Blodgett v. Moore*, 141 Mass. 75, 76.

³ Code 1876, § 2233.

⁴ Revision of 1874, § 5767.

⁵ Civil Code, § 6300.

⁶ Revision of 1876, pt. 4, ch. 3, § 5.

⁷ Wagner's Revision, ch. 145, § 6.

⁸ N. Y. R. S., pt. 2, ch. 6, art. 3, § 42.

⁹ *Ellis v. Darden*, 86 Me. (1884), 368, 12 S. E. R. 652.

a statute conferring testamentary capacity upon a married woman is not retroactive, nor will it prevent the revocation of a will by her subsequent marriage which she made while she was single and which was executed *prior to the passage of the statute*.¹ In the state of New York it has been held, construing the statute, that a *widow is an "unmarried" woman* within the statutory meaning of that word.² So, where a woman, during a second coverture, made a will devising her property to her children by her *first marriage*, survived her husband, and died subsequently after having married a third time, but leaving no issue by the last marriage, the will was not revoked.³

§ 237. **The irrevocability of a will executed under a power reserved to a married woman.**—An instrument *in the nature of a will* executed by a woman *prior to marriage*, under a power reserved to her in an ante-nuptial settlement to dispose of her separate property by will, is not revoked either in law or equity by her marriage.⁴ This exception, though seemingly technical, is founded on reason, for the *will* of a testatrix concerns only an estate to which she has in her own right the legal title alone; while the *execution of a power is carrying out the intention of another*. The power can be and usually it is given to be executed either before or after marriage. Though the writing is in form a will, the statutory rules of revocation do not apply

¹Smith v. Clemson, *supra*. The fact that the will of a single woman is erroneously admitted to probate does not prevent a child, by a marriage entered into subsequent to its execution, from claiming his share of the estate against the will. In re Craft, 80 Atl. R. 520, 35 W. N. C. 413, 164 Pa. St. 520.

²In re Kaufman's Will, 16 N. Y. Supp. 113, 61 Hun, 381, 30 N. E. R. 242, 131 N. Y. (1892), 620. *Contra*, In re Comassi, 107 Cal. (1895), 1, 40 Pac. R. 15, where it was held that the will of a woman made *during coverture* was not revoked where she *survived her husband and remarried*.

³In re Ward, 70 Wis. 251, 35 N. W. R. 731.

⁴Rippon v. Dowding, 2 Amb. 265; Churchill v. Dibben, 2 Kenyon, pt. 2,

p. 82; Dillon v. Grace, 2 Sch. & Lef. 463; Doe v. Bird, 2 N. & M. 679; Downes v. Timperon, 4 Russ. 334; Osgood v. Bliss, 141 Mass. 474, 477; Ward's Will, 70 Wis. (1887), 251, 256; Ela v. Edwards, 16 Gray (Mass., 1860), 91; Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523, 540. A will executed by a woman two days before marriage, under an ante-nuptial contract reserving to her the right to dispose of her property by will, is not revoked by a statute which enacts that wills shall be revoked by marriage. The court held that the contract and the will were one transaction, and as the contract must be sustained so also must the will. Stewart v. Mulholland (Ky.), 10 S. W. R. 125 (construing Gen. St. Ky., ch. 113, § 9).

to it, as it is executed in pursuance of a power and depends for its efficacy upon the statute of uses and not upon that of wills.¹ And it is not material that the legal title to the property is in the wife, and has not been conveyed to trustees *prior* to her marriage, in order that the implied revocation of the will of a single woman arising from her marriage shall not apply in such circumstances. A mere agreement is sufficient, and a power in trust will be implied.²

§ 238. **Statutory enactments that the marriage of a man shall effect a revocation.**—The common-law rule that the marriage of a man without the birth of issue did *not* revoke his will has been by statute expressly repealed in many states. In some it is provided that the will of a man, made at any time prior to his marriage, shall be revoked by his marriage, unless it shall appear that it was made *in contemplation of marriage*, or unless it shall appear that the wife was provided for therein, or unless she was provided for by an ante-nuptial agreement or otherwise. Under statutes which provide that there shall be no revocation if the will was made in contemplation of marriage, it is necessary to ascertain how this fact shall be proved. Some require that it shall be apparent from the will itself, and then parol evidence is excluded.³ A will making a substantial provision for a woman who subsequently becomes the wife of the testator, though a contemplated marriage with her was not mentioned, has been held to have been made in contemplation of marriage.⁴ Though in another case the mere fact that a testator gave a woman whom he afterwards married his property, the court did not regard as evidence of having been made in contemplation of a marriage with her.⁵

Under some statutes, where the will neither provides for the

¹ Osgood v. Bliss, 141 Mass. (1886), 474, 477-479; Hodsden v. Staple, 2 T. R. 684; Hodsden v. Lloyd, 2 Bro. C. C. 534; Taylor v. Rains, 7 Mon. 184; Logan v. Bell, 1 Com. Bench, 872; McMahon v. Allen, 4 E. D. Smith (N. Y.), 579 (1837); Lant's Appeal, 95 Pa. St. 279.

² Bradish v. Gibbs, 3 Johns. Ch. (N. Y., 1818), 522, 540; Rippon v. Dowding, 2 Amb. 265; Doe v. Staple, 2 T. R. 695; Barnes v. Erwin, 2 Dallas

(1 U. S., 1787, 119; Wright v. Cadogan, Amb. 468, 6 Bro. P. C. 156. See § 121 et seq. as to the testamentary capacity of married women.

³ Ingersoll v. Hopkins (Mass., 1896), 49 N. E. R. 623; Ellis v. Darden, 88 Ga. (1890), 368, 12 S. E. R. 652.

⁴ Appeal of Fidelity Safe Dep. & Trust Co., 121 Pa. St. 1, 15 Atl. R. 494.

⁵ Ingersoll v. Hopkins (Mass., 1896), 49 N. E. R. 623.

wife nor appears to have been made in contemplation of marriage, parol evidence is received to show that she was provided for under an ante-nuptial contract, giving her a share of her husband's property, or that an instrument had been executed by the parties mutually releasing all claims which either might have against the estate of the other.¹ The contract which will sufficiently rebut the presumption of a revocation arising from a subsequent marriage must in itself purport to make provision for the wife in lieu of testamentary provision.² For, if such is not the case, the court cannot receive parol evidence to show what the parties meant by the contract, or to show what their respective property amounted to.³ Thus a deed of separation by which, for a valuable consideration, the wife released all claim to the property of her husband after his death, but not referring to any will executed before the marriage, is not such a contract as will prevent the revocation of such a will under the statute; nor can the probate court inquire into the facts, or the reasonableness of the consideration on which the agreement is based.⁴

§ 239. The revocation of a will implied at common law from marriage and birth of children.—In the absence of statute, the marriage *alone* of a man, without the birth of issue, does not revoke his will disposing of either real or personal property.⁵ The early law protected the widow's right of dower.

¹ *Biggerstaff v. Biggerstaff*, 95 Ky. 154, 23 S. W. R. 965. See also *Wheeler v. Wheeler*, 1 R. L. 364.

² *In re Corker*, 87 Cal. (1891), 643, 25 Pac. R. 922.

³ *In re Corker*, 87 Cal. 643, 25 Pac. R. 922.

⁴ *In re Corker*, *supra*. The revocation of a will, either of a man or a woman, by his or her marriage, is absolute. The subsequent divorce of the parties does not revive it, though it would seem that, as the main object of the statutory revocation is to provide for a wife who is not provided for in the will (and that this is the object of the statute appears from the fact that where the wife is provided for, either in the will or by

ante-nuptial contract, it is not revoked), the will should not be regarded as revoked where the woman who becomes the wife of the testator has ceased to be his wife before his death by divorce for her fault. The only case in which the question arose was decided the other way, and the reason of the decision is not far to seek. It may be found in the statutory rule that a will *once revoked* is void for all purposes, unless re-executed with legal formalities. *Stewart v. Powell*, 90 Ky. (1890), 511, 14 S. W. R. 496.

⁵ *Morgan v. Davenport*, 60 Tex. (1888), 230, 235; *Brown v. Scherrer*, 5 Colo. App. (1894), 255, 38 Pac. R. 427; *Shorten v. Judd* (Kan., 1898), 55 Pac.

Where a devise of real estate was contained in a will made prior to marriage, the devisees took subject to her dower.¹ While the law permitted her to be deprived of personalty absolutely by the previously-executed will, the hardship to her was not great, because the amount of such property was extremely limited until the beginning of the present century, when, by reason of the increase of manufactures and the spread of foreign commerce, great amounts of personal property were diffused among the people. So the custom of marriage settlements, by which the welfare and support of the wife and children were provided for, mitigated any possible hardship which might arise from a too rigid application of the rule, and retarded its repeal.

The birth of a child *alone* did not at the common law revoke a will made *after* the marriage of the testator. The law presumed that a married man having capacity to make a will would take into consideration the natural possibility of the subsequent birth of children to him, and, not having provided for them or mentioned them in his will, he was conclusively presumed to have intended to give them no portion of his property at his death.² But when, however, the testator executed a will, and *thereafter married and also had born to him one or more children*, the will was regarded as revoked by implication arising from this combination of circumstances in which the testator had voluntarily placed himself, and the new duties and responsibilities which he had thus assumed, not only to those who composed his family, but to the community upon which would be cast the support of such persons in case his property were diverted by his will from them, who would take it as his heir or next of kin. This rule was adopted as to legacies by the ecclesiastical courts in conformity with the rule of the Roman law, elsewhere explained, during the reign of Charles II.³

R. 286; In re Hulett, 34 L. R. A. 384, Gibbons v. Cross, 2 Addams. 455; 388 (Minn.), 69 N. W. R. 31; Bowers v. Bowers, 53 Ind. (1876), 430, 438; 1820), 506.

Munday v. Munday, 8 Ohio Dec. 44; 4 Kent, Com. 507; Shepperd v. Shepperd, 5 T. R. 51. See also 5 L. R. A. 346.

¹ *Post*, § 744.

² Doe v. Barford, 4 Maule & Sel. 10; Shepperd v. Shepperd, 5 T. R. 51;

³ Overbury v. Overbury, 2 Show. 242, 253. See, also, sustaining the rule, Lugg v. Lugg, 1 Lord Raymond, 441, Salkeld, 592, 12 Mod. 236; Shepperd v. Shepperd, 5 T. R. 51, 4 Kent, p. 506. See also *post*, § 240.

But this rule was received with doubt even by those courts, and adopted with hesitation by the courts of chancery and common law, so far as it was attempted to be applied to estates of freehold, despite the marked preference for the heir at law. The doctrine was ultimately adopted about the year 1771 by the English court of exchequer.¹ The rule was always subject to some exceptions. Thus marriage and the birth of issue did not revoke an existing will at the common law, unless the will purported to *dispose of the entire estate of the testator*.² So, too, the fact that a provision had been made in the will for the benefit of the wife and the children; or the fact that, either prior or subsequent to the marriage, the testator had made provision for his wife and the children of the marriage by means of a deed of settlement, will prevent the revocation of his will.³

§ 240. In the Roman law the birth of a child operated as a revocation—Reasons for the rule.—In the Roman civil law the birth of a child to the testator subsequent to the execution of the will revoked it.⁴ Not only was this the rule, but by the early Roman law no son could be disinherited by implication or by the silence of the will. Under Roman law, in order to deprive a son or the issue of a deceased son (and later the same rule was extended to daughters) of all interest in the property of their deceased ancestor, it was necessary to disinherit them in express terms.⁵ The inofficious character of the testament might always be shown by evidence from which the court could see that its provisions were unnatural and inconsistent with the duties of a parent to his children. If, upon the circumstances, the *prætor* was satisfied that the will was unjust, he had jurisdiction to set it aside by the employment of the legal fiction that the parent did not possess mental capacity to

¹ *Christopher v. Christopher*, Dickens, 445. See also *Wellington v. Wellington*, 4 Burr. 2163; *Brown v. Thompson*, 1 Eq. Cas. Ab. 413; *Eyre v. Eyre*, 1 Peere Williams, 304; *Gibbons v. Caunt*, 4 Ves. 848; *Langford v. Little*, 2 Jones & Lat. 633; *In re Sherley*, 2 Curt. 657; *Belton v. Summers*, 31 Fla. (1893), 139, 12 S. R. 371; *Warner v. Beach*, 4 Gray (Mass.), 162, 163; *Sherry v. Lozier*, 4 Bradf. 447; *Betts v. Jackson*, 6 Wend. (N. Y.) 173.

² *Kenebel v. Sefton*, 2 East, 530, 541; *Marston v. Fox*, 8 Ad. 14, 57.

³ *Marston v. Fox*, 8 Ad. & Ellis, 14, 2 Nev. & P. 504; *Israel v. Rondon*, 2 Moore P. C. C. 51; *Kenebel v. Sefton*, *supra*.

⁴ 4 Kent, Com. 505.

⁵ Inst., lib. 2, ch. 13, sec. 5, and Inst., lib. 2, ch. 16, sec. 1; 2 Black. Com., p. 502.

execute a testament.¹ These provisions of the Roman law, however impolitic and unwise they may appear viewed from the modern standpoint, were consistent with that system of jurisprudence because of the importance which it attached to the integrity and preservation of the family, and the care with which the interests of the family were protected. The Roman law made the family, not the individual, the unit. The authority of the parent over those who by birth or marriage became members of his family was far-reaching; and, until limited by the enlightened legislation of Justinian and the later emperors, in the highest degree arbitrary. To compensate those over whom this power was exercised during the life of the father, he was not permitted totally to disinherit any of them without reason. With the diminution of the power of the father, which is everywhere so noticeable in modern times, his right to discriminate among the children, or to leave them wholly unprovided for by his will, is recognized by the law as a necessary privilege to enable a parent to secure from their self-interest that deference and obedience which he does not possess the power to enforce under a system of legal rules by which the individual, and not the family, is regarded as the social unit, and which the affection of his children does not prompt them to render. But our law, while it permits the father to disinherit his child altogether without looking closely into the reasons which prompted him, protects the interests of a child born *subsequent to the execution of the will*, and who is not mentioned in it, upon the very reasonable assumption that the silence of the parent as to a testamentary provision for that child was the result of accident or inadvertence, and not of a deliberate intention to disinherit one against whom, at least when the will was made, the testator could have had no reason to discriminate.²

§ 241. Statutory legislation affecting the rights of children omitted from the will.—The common-law rule that the

¹ Inst., lib. 2, ch. 18, *De inofficioso testamento*.

² In the Roman law any legacy to a child, however small, was sufficient to rebut the presumption of an inofficious will, for it showed the father had memory and reason, and had some cause for giving him less than

it would have otherwise received. And Mr. Blackstone supposes that from this rule of the Roman law arose the groundless error that it was necessary to leave the heir a shilling or some small gift in order to disinherit him. 2 Black. 502.

birth of a child *after* the execution of a will does not revoke it is abolished by statute in many states.¹ These statutes sometimes provide that if the testator shall *omit to provide in his will for any of his children* they shall take the shares they would have taken had he died intestate, unless it *shall appear that the omission was intentional*. This is the form of the statute in California,² Michigan,³ Missouri⁴ and Washington.⁵ In other states the birth of a child in the life-time of the testator or posthumously, after the execution of a will, is either a total revocation or a revocation *pro tanto*, if he is omitted intentionally from the will. In New Jersey,⁶ Ohio,⁷ Oregon⁸ and Iowa,⁹ the will is revoked by the birth of a child after execution, who is intentionally omitted, though at the execution the testator had other children for whom provision is made.¹⁰ In Illinois,¹¹ New York,¹² Washington,¹³ Rhode Island,¹⁴ Tennessee,¹⁵ and in the majority of the states, the birth of a child subsequent to execution is not a total revocation, but he takes under the statute the same share he would have taken had his father died intestate. The will is absolutely *void as to him*, and if the executors, in pursuance of a power of sale, sell the lands, no conversion of his share takes place, and the purchaser takes

¹ See 5 L. R. A. 346.

² In re Grider's Estate, 81 Cal. (1889), 571, 22 Pac. R. 908; Civil Code, § 1307.

³ Howell's Statutes, 6810; Stebbins v. Stebbins, 94 Mich. 304, 54 N. W. R. 159.

⁴ R. S. 1889, 8877.

⁵ Gen. Statutes, § 1465; Hill v. Hill, 7 Wash. 409.

⁶ Revision N. J., p. 1259, § 20; Coudert v. Coudert, 48 N. J. Eq. (1887), 407, 5 Atl. R. 722.

⁷ Rev. St., § 5959; Rhodes v. Weldy, 46 Ohio St. 234.

⁸ Hill's Code, § 3075.

⁹ Alden v. Johnson, 18 N. E. R. 896, 63 Iowa (1884), 124, 126; Negus v. Negus, 46 Iowa (1877), 487; Carey v. Baughan, 36 Iowa (1873), 540; Milburn v. Milburn, 60 Iowa, 411, 412.

¹⁰ Negus v. Negus, 46 Iowa, 487, 490;

McCallum v. McKenzie, 26 Iowa (1868), 510; Fallon v. Chidester, 46 Iowa (1877), 588, 599. As to the effect of the birth of an *illegitimate child* in a state where such child may, by statute, inherit from its father when its paternity is proved or acknowledged, see Milburn v. Milburn, 60 Iowa, 411, 413.

¹¹ Rev. St., ch. 39, § 10; Lurie v. Radnitzer (Ill., 1897), 40 N. E. R. 1116.

¹² Laws 1869, ch. 22, and 2 Rev. St., p. 65, § 49; 4 R. S. (8th ed.), p. 2549, § 49.

¹³ Hill v. Hill, 35 Pac. R. 360, 7 Wash. 409; Gen. St. 1465, also holding the statute applies to community property.

¹⁴ Public St. R. I., ch. 182, § 12; Trust Co. v. Hospital, 36 Fed. R. 863.

¹⁵ Mill & V. Code, § 8033.

subject to his claim for partition.¹ In West Virginia the statute provides that where one who has no children makes a will and a child is subsequently born, but unintentionally omitted, the will shall be construed as though the devise therein had been limited to take effect on the death of such child unmarried and without issue.²

§ 242. What provision for a child prevents revocation.—

Nearly all the statutes which enact that a will shall be revoked by the subsequent marriage of the testator, or, if he is married at the date of execution, that it shall be revoked by the subsequent birth of a child unprovided for in it, exclude those cases from their operation where, though the child is *not* provided for in the will, it appears that the omission to provide for him *was intentional on the part of the testator*. The proper mode of showing that the failure to provide for a child was intentional depends upon the phraseology of the statute. In those jurisdictions where the intention of the testator to omit a child cannot be proved by *parol evidence*, his intention must appear from the language of the will itself in clear terms, either expressly or by necessary implication.³ A will that makes no mention whatever of the child does *not show that the omission of his name from it was intentional*.⁴ The testamentary provision for a child who is born *after* the execution of a will, which will prevent his birth operating as a revoca-

¹Northrup v. Marquam (Oreg.), 18 Pac. R. 449.

²Code 1887, ch. 77, § 16. Thus, a devise to A., the husband of the testatrix, to whom a child is subsequently born, gives him his estate by the curtesy with an executory devise in fee expectant upon the death of the child unmarried and without issue. Beitner's Ex'rs v. Von Ahlefeldt, 33 W. Va. (1890), 663, 11 S. E. R. 46.

³Rhoton v. Blevin, 99 Cal. (1893), 645, 34 Pac. R. 513. See also § 243.

⁴In re Stevens' Estate, 83 Cal. (1890), 322, 23 Pac. R. 379; Leonard v. Enochs (Ky.), 17 S. W. R. 437; In re Witter's Estate, 15 N. Y. Supp. 133; Merrill v. Hayden, 86 Me. 133, 134, 29

Atl. R. 949; Mercantile Trust & Deposit Co. v. Rhode Island Hos. Trust Co., 36 Fed. R. 863; Thomas v. Black, 118 Mo. 66, 20 S. W. R. 657; Bower v. Bower (Wash.), 31 Pac. R. 598; In re Barker's Estate, 5 Wash. St. 390, 31 Pac. R. 976 (holding that a devise to A. of all the property, "to the exclusion of every one else who may or might be entitled to the same," is not a mention of children which will exclude them). A specific bequest *by name* to the children of a child of the testator who live with their parent is a sufficient *naming of the parent* to comply with the statute. Woods v. Drake (Mo.), 37 S. W. R. 109.

tion of it, must be of a substantial and valuable character, unless the testator shall, in mentioning him in the will, clearly show an intention to disinherit him altogether. Thus, a mere trivial gift of a few books,¹ or a direction that a child's debts shall be paid,² or a gift of one dollar,³ or a provision by which the testator, having no children at the date of execution, but, being married, gives a legacy to his sister "*if he shall die leaving no children*," which legacy is to be diminished if he shall die leaving children, and, in either event, bequeaths all the residue of his estate to his wife,⁴ or a vague and indefinite provision as a devise of a reversion by the testator to his heirs,⁵ among whom may be the child, is not a provision which will prevent after-born children from taking as though the testator died intestate. Where the statute provides that a posthumous child, for whom no provision is made, shall take the share of the estate that he would have been entitled to if the parent had died intestate, the court has held that a mere provision for the children *as a class*, to vest at a future date, was not enough. The provision was evidently unintentional, as the testator had not in mind the birth of a posthumous child. The statute is intended to protect the interests of all the children of the testator, particularly of those who are very young at his death, and who, if the parent does not provide for them, will require support at the hands of strangers. If the testator disposes of his whole estate to his widow for life, and on her death to his children *as a class*, or, without creating a life estate, disposes of his whole estate to his children as a class, payable as they attain the age of twenty-one years, and dies leaving a posthumous child or children of tender years, it is evident that he has *not provided for them* while they are fatherless during that part of their life prior to maturity,

¹ *Stebbins v. Stebbins*, 94 Mich. (1892), 304, 54 N. W. R. 159, construing Stats., sec. 581, requiring a provision to be made for the use of the child.

² *Warley v. Taylor*, 31 Oreg. 589, 28 Pac. R. 903.

³ *Bowman v. Bowman*, 49 Fed. R. 329, 7 U. S. App. 63.

⁴ *Mercantile Trust & Deposit Co. v. Rhode Island Hospital Trust Co.*, 36

Fed. R. 863. The provision must be of an estate which vests at the death of the testator (*Minot v. Minot*, 45 N. Y. Supp. 554), though it need not be as much as the court may deem adequate nor payable out of any particular kind of property. *Minot v. Minot*, 45 N. Y. Supp. 554.

⁵ *Waterman v. Hawkins*, 63 Me. (1874), 156.

when they are in need of education and support and utterly unable to support themselves. If they must wait until their majority to receive a share in the father's estate, they may become objects of charity and be reduced to penury, while their brothers and sisters are well cared for. This is absurd and contrary to all rules of humanity, and certainly not in the purview of the statute.¹ Under some of the statutes a will is not revoked by marriage and birth of issue who are not mentioned in the will, if provision for such issue has been made by a gift to or settlement upon them. Thus it has been held that an ante-nuptial contract by which the testator conveyed real and personal property in trust for his intended wife for her life, remainder to the issue of the marriage living at the death of the testator, and, should such issue die unmarried, remainder to the heirs of the testator, is a sufficient provision for the issue of the marriage to take the case out of the statute so that the will is not revoked.²

§ 243. The admissibility of parol evidence to rebut the presumption of revocation arising from the omission to provide for children in the will.—Whether parol evidence of the statements of the testator as to his intention and of the circumstances was competent to rebut a presumption of revocation arising from marriage and the birth of a child was not definitely determined in the earlier cases. Lord Chancellor Mansfield admitted the evidence,³ but the majority of the English cases are against this view, the court remarking⁴ that "parol evidence did not weigh at all, being only conversations and not amounting to a republication, and a court of law would pay no regard to it." Afterwards it was determined that parol evidence could not be received to show an intention that a will presumptively revoked by marriage and the birth of children should be operative, for to do so would be equivalent to making an oral will.⁵ Prior to this, by which the law was defi-

¹ *Bowen v. Hoxie*, 137 Mass. (1884), 527, 528; *Halloman v. Copeland*, 10 Ga. (1851), 79; *Waterman v. Hawkins*, 63 Me. 156; *Willard's Estate*, 68 Pa. St. (1871), 327; *Potter v. Brown*, 11 R. I. 232; *Talbird v. Verdier*, 1 Des. Eq. (S. C., 1800), 592.

² *Gay v. Gay*, 84 Ala. (1887), 38, 4

S. R. 42 (construing Code, sec. 2282). The provision required by the statute may also be made *after* the issue is born.

³ *Brady v. Cubit*, Doug. 31.

⁴ In *Kenebel v. Sefton*, 5 Ves. 663, 2 East, 530, 541.

⁵ *Marston v. Roe*, 8 Ad. & Ellis, 14.

nately settled in England, the church courts had freely admitted parol evidence in the case of wills of personal property, to rebut the presumption of implied revocation.¹

In the United States the statutes generally read that the will shall be revoked *pro tanto* where the testator has omitted to mention or provide for one of his children, and sometimes for the issue of a deceased child; and that, *unless it shall appear that the omission was intentional*, the child shall take the same share that he or she would have taken had the testator died intestate.²

The question arises, How is the intention to omit the child from the will to be proved? A statute which protects the interest of children omitted, and forbids the intention to omit to be proved by parol evidence, is, of course, conclusive.³

The majority of the statutes point out no mode in which the proof of intention to omit may be made. The decisions are hopelessly at variance on this point. Parol evidence is, ordinarily, not admissible to prove the intention of a testator to dispose of his property. The law, requiring that a will shall be in writing, will not stultify itself by permitting it to be added to or subtracted from by oral statements. But here it cannot be said, in strictness of language, that it is sought to *show what provision the testator did or did not intend to make, but whether he intended to make any provision*. The question

¹ Gibbons v. Cross, 2 Addams, 455; Fox v. Marston, 1 Curteis, 494.

² Branton v. Branton, 23 Ark. (1861), 569; In re Grider, 81 Cal. (1889), 571, 575, 22 Pac. R. 908; Stevens' Estate, 83 Cal. (1890), 322, 23 Pac. R. 379; In re Barter, 86 Cal. 441, 443, 25 Pac. R. 15; Salmon's Estate, 40 Pac. R. 1030; Smalley v. Smalley, 70 Me. (1880), 545, 550; Whittemore v. Russell, 80 Me. (1888), 297, 14 Atl. R. 197; Morrill v. Hayden, 86 Me. 133, 29 Atl. R. 449; Hurley v. O'Sullivan, 137 Mass. (1884), 86; Prentiss v. Prentiss, 92 Me. 47; Wilder v. Thayer, 97 Mass. (1867), 439; Ramsdill v. Wentworth, 101 Mass. (1869), 124; Peters v. Siders, 126 Mass. (1879), 135, 137; Stebbins' Estate, 94 Mich. (1892), 304; Pounds v. Dale, 48 Mo. (1871), 270; Wetherall

v. Harris, 51 Mo. (1872), 65; Schneider v. Koster, 54 Mo. (1874), 500; Young v. Case, 3 Minn. (1859), 209; Gage v. Gage, 29 N. H. (1854), 533; Gerrish v. Gerrish, 8 Oreg. (1880), 351; Northrop v. Marquam, 16 Oreg. (1888), 173, 186, 18 Pac. R. 449; Burns v. Allen, 93 Tenn. 149; Moon v. Evans, 69 Wis. 667.

³ Rhodes v. Welby, 46 Ohio St. 234 (1889), 20 N. E. R. 461 (construing Rev. St. Ohio, sec. 5959, which provides that the birth of a child after the execution of the will shall work a revocation unless the child is provided for or mentioned so as to show an intention not to provide for him, and that no other evidence shall be received to rebut the presumption of revocation).

is, not how much or how little the testator intended to give the child, but whether he meant to give him anything at all. The statutes only aim to correct the negligence or forgetfulness of parents as to children born after the making of their wills, and, *a fortiori*, in the case of children living at the date of the will, and not to supply any intention for their benefit. The testator's right to omit his children from his will is not curtailed, but those who benefit by the omission are required to show that it was not the result of a mistake, accident or inadvertence. So, under the general principle which permits a mistake in a writing to be corrected by parol, some courts have held that parol evidence, including declarations, is admissible to show that the omission of the child was, or was not, intentional.¹ Elsewhere it is held, under statutes differently worded,

¹ *Coulam v. Douall*, 133 U. S. (1889), 216, 10 Supreme Ct. 253, affirming 4 Utah (1886), 267, 9 Pac. R. 568 (Act Utah, Feb. 18, 1876, sec. 10; Comp. Laws, sec. 694). To the same effect, *Lorieux v. Keller*, 5 Iowa, 196; *Whittemore v. Russell*, 80 Me. 297, 299, 14 Atl. R. 197; *Wheeler v. Wheeler*, 1 R. I. 364; *Miller v. Phillips*, 9 R. I. 141. The Massachusetts statute, which has served as a model for a majority of the others, gave every child unprovided for in the will a distributive share in the estate, provided he had not already received his share by advancement. Stat. 1783, ch. 24, §§ 1, 8. The courts held that, when from the will it appeared that the omission to provide was intentional, the child took nothing, and that parol evidence could not be received. *Terry v. Foster*, 1 Mass. (1804), 146; *Church v. Crocker*, 3 Mass. (1807), 17; *Wilder v. Goss*, 14 Mass. (1817), 357. Hence, under the statute, where the will was absolutely silent as to the child, he took, though the silence may have been the result of design. To remedy this the Revised Statutes of 1836, chapter 62, section 21, was passed, providing that children shall take, "unless they shall have been

provided for by the testator in his life-time, or unless it shall appear such omission was intentional and not occasioned by mistake." In construing this statute the courts received parol evidence to show an intentional omission. *Wilson v. Fokett*, 6 Met. (1848), 400, 404; *Converse v. Wales*, 4 Allen (1862), 512; *Buckley v. Gerard*, 128 Mass. (1877), 8; *Ramsdill v. Wentworth*, 101 Mass. (1869), 125, and *Lorings v. Marsh*, 6 Wall. (U. S.) 337, 351. See *Chace v. Chace*, 6 R. I. (1860), 407. In *Coulam v. Douall*, 133 U. S. 216, 225-231, construing a statute which provides that in case a child is omitted from the will "he shall take the same share in the estate of the testator as if he had died intestate, unless it shall appear that the omission was intentional," the court received parol evidence. The court said, on page 231: "Children so situated do not set up title under the will, but under the statute. The inquiry is whether the testator intended to omit them. Evidence that he did does not conflict with the tenor of the will. It simply proves that he meant what he said. Instead of tending to show the testator's real purpose to have

that the intention to omit the child must appear on the face of the will, and that extrinsic evidence is not admissible either to prove or disprove such intention.¹

§ 244. Revocation by change in the circumstances of the testator.— Though the law will in some cases imply an intention to revoke from an alteration in the circumstances of the testator, no such inference or implication will arise merely because the *amount or value of the property owned by him has increased* subsequent to the date of the execution of the will. Where the testator, being the owner of a modest estate, executes a will disposing of all his property or of the rest and residue of the same, and subsequently, by industry or good fortune, acquires a large property, it might reasonably be supposed that his intention has also changed, and that he may have desired to give others a share in his estate. And it has been argued, because a man worth say \$5,000 when he makes a will devising all his property to A. does not destroy or expressly revoke that will when, in later years, he has become a millionaire, that it does not logically follow that he intends or ever did intend that A. should have the million. Under such circumstances it might be supposed that he desired some portion of that large sum to go to other persons than the original devisee. But the law refuses to draw any inference of this nature from an increase of the estate alone, and permits the will to operate on all his estate which he owns at his death.²

§ 245. Revocation by parol at common law.— Prior to the enactment of the statute 29 Car. II., c. 3, sec. 6, it was un-

been other than is apparent upon the face of the will, it confirms the purpose there indicated."

¹ *Lurie v. Radnitzer* (Ill.), 46 N. E. R. 1116, 1118; *Estate of Garraud* (1868), 35 Cal. 336, 339; *Estate of Utz*, 43 Cal. (1872), 200; *Pearson v. Pearson*, 46 Cal. (1873), 609; *In re Stevens*, 83 Cal. (1890), 322, 23 Pac. R. 379; *Bradley v. Bradley*, 24 Mo. (1857), 311; *Burch v. Brown*, 46 Mo. (1870), 441; *Pounds v. Dale*, 48 Mo. (1871), 270; *Wetherall v. Harris*, 51 Mo. 65; *Rhodes v. Weldy*, 46 Ohio St. 234; *Bower v. Bower*, 5 Wash. St. (1892), 225, 31 Pac. R. 598; *Bresce v. Stiles*, 23 Wis. (1867),

120, 124; *Thomas v. Black*, 113 Mo. (1892), 66, 20 S. W. R. 657.

² *Warner v. Beach*, 4 Gray (Mass.), 162, 164; *Webster v. Webster*, 105 Mass. (1870), 538, 542; *Hoitt v. Hoitt*, 63 N. H. (1885), 475, 479, 1 Am. Prob. R. 529, 533; *Vandemark v. Vandemark*, 26 Barb. (N. Y., 1858), 416; *Verdier v. Verdier*, 8 Rich. (S. C., 1855), L. 135, 140-143; *Graves v. Sheldon*, 2 D. Chip. (Vt., 1824), 71, 75; *Blandin v. Blandin*, 9 Vt. (1837), 210, 211. This question is not to be confounded with the question whether the will shall operate to pass after-acquired lands. Cf. *ante*, §§ 60-64.

doubtedly the law in England that a devise of lands, executed under the statute of wills, could be revoked by evidence of the declarations of the devisor.¹ And the same rule was recognized by the ecclesiastical courts as to bequests of personalty.²

Under the English Statute of Frauds and similar statutes in the American states, it is usually requisite that a will or codicil which, either in express language or by an inconsistent testamentary disposition, revokes an existing will, shall be executed in accordance with the formalities that are required in the case of the will which it is intended to revoke.³ The revocatory paper, in form a will, is not valid as a revocation unless it shall be signed, or subscribed and attested as a will is required to be by the statute. And the same kind and measure of proof are required on the probate of a will which *merely revokes all former wills* as in the case of wills disposing of property.⁴

§ 246. Attempted revocation by non-testamentary writings.— *The testator cannot*, in a will which is properly executed according to the statute, create or reserve to himself the right to revoke it by a subsequent writing not properly executed as his will, which is not then in existence, but which is to come into existence at some future time.⁵ A testator may give a legacy which is only to be paid in the event that he shall not, during his life-time, pay the like sum to the legatee, or which is to fail on the happening of some event during his life. He may provide that no deduction shall be made from any legacy for advancements unless entries of the same shall be found in his books. But he cannot declare that any entry in his books

¹ *Cranvel v. Saunders*, Cro. Jac. 467, 1 Roll. Abb. 614.

² *Ilchester's Case*, 7 Ves. 348, 371, 377. These ancient rules, so obviously calculated to encourage fraud and perjury, were absolutely repealed by the provisions of the statute above mentioned, which were, as is pointed out, § 247, equally applicable to wills of personal and wills of real property.

³ *Post*, § 247.

⁴ *In re Noyes*, 17 Atl. R. 743, 61 Vt. 14 (1888). See also *Hollinshead v. Sturgis*, 21 La. Ann. 450; *Deakins v. Hollis*, 7 Gill & J. (Md., 1835), 311; *Hammond's Will*, 4 N. Y. S. 456;

Laughton v. Atkins, 1 Pick. (Mass., 1805), 535. A writing drawn up at the request of the testator to revoke an existing will has no effect where the testator, prior to its execution, became unconscious, and, for that reason, was unable to execute it. *In re Voorhis' Will*, 54 Hun. 637, 7 N. Y. Supp. 596. See also *Ex parte Ilchester*, 7 Ves. Jr. 348, 372.

⁵ *Langdon v. Astor*, 3 Duer (1854), 477, 16 N. Y. 9, 30-33 (1857); *Thayer v. Wellington*, 9 Allen (Mass., 1864), 283, 291; *Adlington v. Cann*, 3 Atk. 141, 151. See also *post*, §§ 279-284.

shall be conclusive evidence of an advancement, or that such a writing not attested and not in existence when the will is made shall effect a revocation of any provision of the will.¹

So, too, a testator cannot in his will reserve to himself the power to dispose of any part of the property which is comprised in the will by a will or an instrument to be executed subsequently, to take effect as a will, which *is not to be executed in the manner prescribed by statute for the execution of wills*. The testator may devise property upon the condition that the same is not sold by him during his life-time, and then a deed or other conveyance *inter vivos*, intended to have an operation prior to the death of the testator and which is valid to pass the title of the property, will operate by ademption as a revocation of the will.² The latter instrument, though it may have been referred to in the will, is not testamentary, has no essential connection with it, operates independently of it, and would have been valid though the will had never been executed. All that is meant by the rule is that the testator cannot create in himself the right to execute a future testamentary paper in a mode which is not strictly in conformity with the statute.³ A will properly executed giving property in trust, to be appropriated in such manner as the testator shall by an instrument in writing direct, and the appointment of the same by a separate paper to take effect as a part of the will, but not attested as a will, does not constitute a valid bequest, even though the writing gives the money to a charity, particularly when no charity is named in the will.⁴

§ 247. The revocation of wills by subsequent wills or codicils—The Statute of Frauds.—Before proceeding to the consideration of the rules regulating revocation by subsequent

¹ Langdon v. Astor's Ex'rs, 16 N. Y. 2, 30-33. See also *post*, § 510. A direction that executors shall, in case the books of the testator do not show that he has given \$500 annually to a certain charity, give such sum of money to that charity as will make the sum stated, is valid. The legacy does not depend upon the language of documents not in existence at the date of the will. Holmes v. Coates, 159 Mass. 226 (1893), 84 N. E. R. 190.

² *Post*, § 415.

³ Johnson v. Ball (1851), 5 De G. & Sm. 85, 91; Briggs v. Penny, 3 De G. & Sm. 525, 547; Adlington v. Cann (1744), 3 Atk. 141, 151; In re Sotheron, 3 Curt. 881; Wagstaff v. Wagstaff, 2 P. Wms. (1724), 258, 260; Marlborough v. Godolphin, 2 Ves. Sr. 76; Thompson v. Quimby, 2 Bradf. (N. Y., 1852), 449, 459, 2 Wash. R. P., § 695.

⁴ Thayer v. Wellington, 9 Allen (Mass.), 283, 291.

wills or codicils, it may be of value to insert the provisions of the English Statute of Frauds, which is, as has been frequently pointed out, the basis of a large part of our American legislation upon the subject. By the provisions of the Statute of Frauds, "no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, . . . but all devises and bequests of lands and tenements shall remain and continue in force, . . . until the same shall be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same." As regards personal property, the provisions of the statute are as follows: "No will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator and allowed by him, and proved to be so done by three witnesses at the least."¹

§ 248. **The strict construction of revocation clauses.**—Clauses expressly revoking devises and bequests are strictly construed.² The court will endeavor, so far as is consistent with legal rules, to avoid a partial intestacy. The fact that a testator makes a complete disposition of his property in a will containing an express revocation clause precludes any necessity for employing the latter to overturn a former will, for the provisions of the former will are annulled by the inconsistent provisions of the latter. If, however, the later will is inadequate to dispose of the whole estate, and the revocation clause is not complete in its terms, the earlier will ought to be supported so far as possible in order to harmonize the two and avoid a partial intestacy. Thus, where the testator bequeathed specific pecuniary legacies to persons named, and provided that a general or special residue should be divided among such persons in proportion to the value or the amount of their legacies; and in a subsequent codicil expressly revoked one or more of the

¹ Of course, a subsequent will is no revocation of a prior will properly probated until it is also probated. *Sewall v. Robbins*, 189 Mass. 164, 29 N. E. R. 650.

² *Post*, § 258.

legacies, but said nothing as to the residue, it was held that the portion of the residue which would fall to each legatee was separate and distinct from the specific legacy to him, and consequently that his share in the residue was not revoked by the revocation of the legacy.¹ So, too, where the same person is to receive *a specific legacy and a share of the residue*, an express revocation of his share of the residue will not revoke the specific bequest.² So, too, a revocation of a residuary clause does *not* revoke specific gifts.³ Nor will a revocation of *all* codicils, excepting certain property disposed of in one of them, have any effect on *that*.⁴

§ 249. **The revocation clause must show a present intention to revoke.**—The revocation clause must show a present and actual intention to revoke. The language of the testator need not be absolute in its character, effecting a revocation *at all events*. He may revoke conditionally, if he shall observe the proper formalities of execution. Thus, where he said, “it is my intention . . . to alter the above will, or rather to make another will; . . . *if I should die before another will is made*, I desire that the foregoing be considered as revoked,” it was held a revocation by words of present intention showing that the will was to be revoked at all events; and that testator desired to die intestate if he did not execute another will.⁵ But a statement by the testator in writing in a will showing an intention to revoke it *by a future act*, as to dispose of his property at some future time in a manner which by its inconsistency revokes a will previously made, is neither a disposition of the property nor a revocation of an existing will. Thus, in an English case, where the testator, after executing a will, made another for the purpose of disposing of some after-acquired real property, in which he added these words, “as to the rest of my real and personal estate, I intend to dis-

¹ *Colt v. Colt*, 4 Supreme Ct. (1888), 553, 111 U. S. 532, 584, 566, affirming 48 Fed. R. 885; *In re Gibson's Trust*, 2 Jo. & Hem. 656.

² *Roach v. Haynes*, 6 Ves. 153; *Smith v. Curry*, 52 Ill. App. 227; *In re Arrowsmith's Trust*, 2 D., F. & J. 474. *Cf.* *Home v. Noble*, 19 S. Ct. 226 (U. S.).

³ *Webb v. Carpenter*, 16 R. I. 68, 12 Atl. R. 129.

⁴ *McGehee v. McGehee* (Miss., 1897), 21 S. R. 2. See also *Watt's Estate*, 168 Pa. St. 423, 32 Atl. R. 42, 36 W. N. C. 369.

⁵ *Brown v. Thorndike*, 15 Pick. (Mass.) 388, 408, 409.

pose of the same by a codicil to this my will, hereafter to be made," and died without making the codicil, it was held that this was not a revocation.¹ But a letter, properly executed and attested as a will, in the following language: "Inclosed I hand you an order to get my will from Mr. D., which please burn as soon as you receive it without reading. I will leave you my share as a deed of gift, leaving it to your honor to pay out of it" certain legacies, was held a sufficient revocation.²

§ 250. The operation of a revocation clause contained in a will which is wholly or in part void.—A will devising property was, under the Statute of Frauds, required to be attested by the witnesses *in the presence* of the testator. The statute is silent on this point as regards a revoking will; but, on the other hand, the statute required a revoking will to be "signed in the presence of three or four witnesses declaring the same." A devising will was properly executed, though signed out of the presence of the witnesses, if acknowledged in their presence. This variance in the formalities required was productive of very little inconvenience, and, in view of the modern statutes which provide for revocation by writings executed in the same manner as a will, possesses only a historical, not a practical, interest.

If the writing containing a clause expressly revoking former wills is improperly executed as a will, either because improperly attested or subscribed, or because the testator is lacking in testamentary capacity or otherwise, it fails altogether and *in toto*. The disposing part and the revoking part of the will are both ineffectual and fall together. On the other hand, if the later subsequent will is validly executed, and a portion or even the whole of the disposing part shall fail because of the incapacity of a beneficiary to take,³ because of vagueness of

¹ Thomas v. Evans, 2 East, 488, cited in Purdy's Will, 20 N. Y. Supp. 307, 309. See also Cranvel v. Sander, Cro. Jac. 497. So the following indorsement is not a revocation: "Mem.: I declare the will revoked and altogether canceled, etc. I intend to make another will, whereupon I shall destroy this. W. B." The testator never made another

will. In re Brewster, 6 Jur. 56. Where the testator said: "This will is invalid," not attested, it was held a good revocation in Witter v. Mott, 2 Conn. (1816), 67; Card v. Grinnan, 5 Conn. (1823), 164.

² In re Goods of Durance, L. R. 2 P. & D. 406, 409.

³ Hairston v. Hairston, 30 Miss. (1855), 276, 305.

the designation, because of the illegality of its provisions, or for any reason not connected with the execution of the will, the revoking clause will be sustained and permitted to operate, though some or all of the remainder of the will is invalid.¹

§ 251. **Revocation by an inconsistent disposition of property in a subsequent will or codicil.**—The fact that an instrument expressly purports on its face to be the last will of the testator, and to dispose of *all his property*, does not, of necessity, cause that instrument to revoke prior wills, unless it also contains an express clause of revocation; or unless its provisions are *absolutely inconsistent with the provisions of a prior will*.² For a will may revoke prior wills, even though it shall not contain any express clause of revocation.

If a valid will or codicil contains a clause expressly revoking all former wills, or any particular will, the revocation is beyond all doubt, though the clause is couched in ambiguous language. For it has been held that the prior testamentary writing which is intended to be revoked may be referred to in indefinite and vague language; nor is it necessary that the legatee whose legacy is to be taken away should be actually named in the revocatory codicil.³ But generally the question of the revoking effect of a will or codicil arises where the testamentary disposition in the codicil is inconsistent with that in the former will. The general rule is that, if two or more wills, or a will and one or more codicils, executed at different times, are found in the possession of the testator at his death, the provisions of the later will or codicils will prevail over those of the former, *but only so far as they are inconsistent and*

¹ James v. Marvin, 8 Conn. 576; In re Teacle's Estate, 153 Pa. St. 219, 224, 25 Atl. R. 1135, 82 W. N. C. 50; Price v. Maxwell, 28 Pa. St. 23; Burns v. Travis, 117 Ind. 44, 49, 18 N. E. R. 45; Colvin v. Warford, 20 Md. (1863), 357, 394; Wallis v. Wallis, 114 Mass. 510 (1874); Frenche's Case, 8 Vin. Ab. 141, Devise, 3, pl. 4; Roper v. Constable, 2 Eq. Cas. Ab. 359; Coventry v. Coventry, 10 Mod. 464, 467; In re Gentry (1878), L. R. 3 P. & D. 80, 82; Tupper v. Tupper, 1 Kay & J. 665; Quinn v. Butler, L. R. 6 Eq. 225; Ec-

leston v. Speke, 3 Mod. 258; Onions v. Tyrer, 1 P. Wms. 345, 2 Vern. 742; Smith v. Ellis, 1 Ves. 17; Ex parte Ilchester, 7 Ves. Jr. 348, 372; Gossett v. Weatherly, 5 Jones Eq. (N. C., 1859), 46; In re Cunningham, 38 Minn. (1888), 169, 171; Pringle v. McPherson, 2 Brev. (S. C., 1809), 279.

² Freeman v. Freeman, 5 De Gex, M. & G. 704; Lemage v. Goodbar, L. R. 1 P. & D. 57; In re De La Saussey, L. R. 3 P. & D. 42.

³ Ellis v. Bartrum, 25 Beav. 107, 109.

irreconcilable with them. The latest will or codicil is presumed to express the completely matured testamentary intentions of the testator as regards the disposition of his property; and, so far as it cannot be reconciled with the writings which precede it, *they must give way.*

The later will or codicil is a revocation of the earlier, so far as there is an irreconcilable inconsistency between them.

It may be well to draw the reader's attention to the difference between repugnant gifts contained *in the same will*, and repugnant gifts contained in *different wills*, or in a will and in a codicil. In the former case the presumption is that the testator did not intend to revoke the earlier by the later gift, and where the two devises are devises of a fee, the beneficiaries will take as joint tenants.¹ But a contrary presumption obtains where the devises of the same land are contained in different wills, or in a will and a codicil; for here it is extremely likely that the testator has acted with an intention to revoke the former devise by the latter, and that the inconsistency is not merely the result of inadvertence.² But even where the repugnant gifts are contained in different papers, every effort should be made to reconcile the several parts; and the disposition of the later will or codicil should only be permitted to overcome the disposition in the former so far as seems consistent with the whole purpose of the testator. A revocation by implication is not favored by the courts. They will, if possible, endeavor to reconcile and harmonize the several writings in order to give effect to all of them. For it is well settled that a gift stated in clear and unambiguous terms in a will cannot be revoked or cut down by ambiguous or uncertain language in a subsequent will or codicil.³

¹ *Post*, § 360.

² *Post*, §§ 357, 359, 360.

³ *Kelly v. Richardson*, 100 Ala. 584 (1892); *Grimball v. Patton*, 70 Ala. 681 (1881); *De Laveaga's Estate* (Cal.), 51 Pac. R. 1074; *Clarke v. Ransom*, 50 Cal. (1875), 595; *Dunham v. Averill*, 45 Conn. (1877), 79; *Brownfield v. Wilson*, 78 Ill. (1875), 467, 475; *Smith v. Curry*, 52 Ill. App. (1893), 227, 233; *Succession of Shaffer* (La., 1898), 23 S. R. 739; *Pickering v. Langdon*, 22 Me.

(9 Shep., 1843), 413; *Fairfax v. Brown*, 60 Md. (1882), 50, 58; *Halsey v. Convention*, 75 Md. (1892), 275, 281, 25 Atl. R. 781; *Brown v. Lawrence*, 3 Cush. (57 Mass., 1849), 393, 397; *Lamb v. Lamb*, 11 Pick. (28 Mass., 1831), 371, 375; *Den v. Van Cleve*, 5 N. J. L. (1819), 589, 668; *Tilden v. Tilden*, 13 Gray (79 Mass., 1859), 103, 108; *Homer v. Shelton*, 2 Met. (Mass., 1840), 194, 202; *Quincey v. Rogers*, 9 Cush. (Mass.) 291, 295; *Van Vechten v. Keator*, 63

Where the question arises to what extent a will is revoked by a codicil, it should be borne in mind that, in contemplation of law, the codicil must be construed as a part of the will to which it is attached or to which it refers.¹ A codicil is defined as an addition or supplement to a will, and, unless it shall contain express words of revocation applicable to all existing wills, it does not work a revocation, except to the precise extent that the intention of the testator as it is contained and expressed in the codicil is irreconcilable and inconsistent with his intention as it has been expressed in the wills. Every effort should be made to reconcile the provisions of all the writings

N. Y. (1876), 52; Nelson v. McGiffert, 3 Barb. (N. Y., 1848), 158, 165; Brant v. Wilson, 8 Cow. (N. Y., 1827), 56; Simmons v. Simmons, 26 Barb. (N. Y., 1857), 68, 75; Rhyne v. Torrance, 109 N. C. 652, 656; Walls v. Walls (Pa. St.), 37 Atl. R. 859; In re Davis, 6 Pa. Co. Ct. R. 45; Boudinot v. Bradford, 2 Dallas (Pa., 2 U. S., 1796), 266; Price v. Maxwell, 28 Pa. St. (1857), 23, 38; Appeal of Neff, 48 Pa. St. (1865), 501; Fife v. Miller, 165 Pa. St. 612, 617; Bartholemew's Appeal, 75 Pa. St. (1874), 169; In re Leonard's Estate, 10 Pa. Co. Ct. R. 437; Homet v. Bacon, 126 Pa. St. (1889), 176, 24 W. N. C. 214; Reese v. Court, 9 R. I. (1870), 434, 435; Bailey v. Hawkins, 18 R. I. 573, 29 Atl. R. 65; Larrabee v. Larrabee, 28 Vt. 274; In re Fisher, 4 Wis. (1855), 254; Smith v. Bell (31 U. S., 1832), 6 Peters, 68, 84; Rosley v. Wyatt, 14 How. (55 U. S., 1852), 890; Colt v. Colt, 48 Fed. R. 385, aff'd in 4 Sup. Ct. 553, 111 U. S. 582; Home v. Noble, 19 Sup. Ct. 226 (U. S., 1898); Doe d. Hearle v. Hick, 8 Bing. 475; Patch v. Graves, 8 Drew. 548; Hicks v. Doe, 1 Young & J. 470; Alt v. Gregory, 8 D., M. & G. 221; Wells v. Wells, 17 Jur. 1020; In re Colthead, 2 De G. & J. 690; Sawrey v. Rummey, 5 De G. & S. 698, 701; Cleobury v. Brackett, 14 Beav. 583; Norman v. Kynaston, 29 Beav. 96, 3 De Gex, F. & J. 29; Becket v. Harden, 4 Maule & Sel. 1; Baldwin v. Baldwin, 23 Beav. 413, 419; Murray v. Johnson, 3 D. & War. 143; Twining v. Powell, 2 Coll. 262; Duffield v. Duffield, 3 Bligh (N. S.) 261; Fry v. Fry, 9 Jur. 894; Daly v. Daly, 2 Jo. & Lat. 753; Sandford v. Sandford, 1 De Gex & Smale, 67; Ellis v. Bartrum, 25 Beav. (1857), 107, 109; Plenty v. West, 6 Com. Bench, 201; Dempsey v. Lawson, 2 P. D. 98; Read v. Backhouse, 2 R. & My. 246; Pilcher v. Hole, 7 Sim. 208. In construing a codicil, as in construing a will, the leading rule is to ascertain the intention of the testator, and while the mere fact that a man executes a codicil to an existing will *may indicate that he makes some change* in it, yet there is no presumption that he intends to change the whole of it by the disposition in the codicil, unless there shall be express words of revocation. The probability that the testator intends a portion at least of the original will to remain unrevoked is strengthened by his calling the instrument a codicil (In re Howard, L. R. 1 P. & D. 636; Robertson v. Powell, 2 H. & C. 762), for the office of a codicil is usually only to modify the will and by implication to affirm it, and not to overcome all its provisions. See *ante*, § 7.

¹ *Post*, § 279.

and to give full effect to them, or, to speak with more precision, to the various parts of the same instrument.¹

The provisions of the earlier will, so far as they are not affected by the provisions of the later, are still valid.² Where the testator devised a part of his property by a will, and afterwards by another will devised another portion, the two are easily reconciled, and both instruments should be probated. But when he devises a particular piece or part of his property to one person in fee,³ or all the residue of his property to one person in a will, and subsequently devises the same property or the same residue⁴ to another person, the former gift is absolutely revoked. So where, after devising his property to his two sons, the testator executes a codicil which gives the general residue to all his children, the latter will prevail.⁵

§ 252. The doctrine of conditional or preparatory revocation.—If an act of cancellation, obliteration or destruction is performed on a will by a testator with an intention to revoke and to execute a new will in place of that destroyed, and the *new will is not executed by reason of circumstances beyond his control*, or, being executed, is for any reason subsequently pronounced invalid, the attempted revocation will not be effective.⁶ The cancellation or other destruction will be regarded as *conditional* upon the existence of and as *preparatory to the new*

¹ *Post*, § 359.

² *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Snowhill v. Snowhill*, 23 N. J. L. 447.

³ *In re Hough's Estate*, 15 Jur. 943, 20 L. J. Ch. 422.

⁴ *Fownes v. Clark*, W. N. 1876, pp. 168, 249; *Hardwicke v. Douglas*, 7 Cl. & Fin. 795. Where the testatrix executed two wills, the latter of which did not expressly revoke the former, and the provisions of both wills were identical, according to the events which happened, the earlier will was admitted to probate where the latter could not be found upon the death of the testator. In *Goods of Radcliffe*, 65 Law Times, 165; *Kermode v. Macdonald*, L. R. 1 Eq. 457, L. R. 3 Ch. 584. In this case a gift of "all the personal estate" was construed to be a com-

plete revocation of a will containing specific and general legacies, and a devise of all the rest and residue.

⁵ *Sturgis v. Work*, 122 Ind. 134, 23 N. E. R. 996. In a case where the testator gave the residue to several as tenants in common; and, by a subsequent codicil, gave land which was a part of the residue to four persons, directing that it should be sold and the proceeds divided among them. it was held that the codicil was, as to the land, an absolute revocation, and that the rents and profits of the land which should accumulate before it was sold did not pass to the devisees under the former will, but went to those who were to take under the trust created by the codicil. In *re Baby's Will*, 4 N. Y. Supp. 182.

⁶ Compare *ante*, § 225.

will, and not absolute, to take effect in any event. It will be presumed (and the presumption is sanctioned by reason and good sense) that the testator meant the cancellation to operate as a revocation only in the event of the will which he had intended to make being valid. If, therefore, he is prevented from executing any will, or the one he intends to make, or if he executes a will which turns out to be invalid, the will which has been revoked will revive. The testator never had an intention to revoke it absolutely in order to die intestate, but *only to revoke it in case his subsequent will was admitted to probate*.¹

The same rule is applied in a case of an alteration or interlineation. If it appears that the primary purpose of the interlineation was *substitution and alteration*, and not revocation, and this purpose fails because the interlineation or cancellation is not properly executed to take effect as a disposing will, the court will presume that it was a conditional and relative revocation, which was to be of no effect if the new disposition was not effectual. Hence where the testator crosses out the name of a legatee and inserts another, or diminishes or augments the amount of a legacy, after the execution of the will, and the alteration is inoperative as a substitution,² it will not be permitted to effect a revocation, and the will must be admitted to probate in its original condition. The maxim of the civil law, *Tunc prius testamentum rumpitur cum posterius rite perfectum est*, will be invoked and respected.³

¹ *Doane v. Hadlock*, 42 Me. (1856), 72, 75; *Gardiner v. Gardiner*, 65 N. H. 230, 233, 19 Atl. R. 651; *Jackson v. Holloway*, 7 Johns. (N. Y.) 294; *Means v. Moore*, 3 McCord (S. C., 1825), L. 173, 175; *Bethel v. Moore*, 2 Dev. & Bat. (19 N. C., 1837), 311, 316; *Eschbach v. Collins*, 61 Md. 478, 498; *Semmes v. Semmes*, 7 Har. & J. (Md., 1826), 388, 391; *Stover v. Kendall*, 1 Cold. (Tenn.) 557, 561; *Pringle v. McPherson*, 2 Brev. (S. C., 1809), 279; *Perrott v. Perrott*, 14 East, 423, 440; *Hyde v. Hyde*, 1 Eq. Cas. Ab. 819; *Clarkson v. Clarkson*, L. J. (N. S.) 31 P. M. A. 163; *Winsor v. Pratt*, 5 J. B. Moore, 484, 498; *In re Brewster*, 6 Jur. 56; *In re Appleby*, 1 Hagg. 143.

² *Ante*, §§ 223, 229.

³ *Wolf v. Bollinger*, 62 Ill. 372; *Eschbach v. Collins*, 61 Md. 478, 498; *Laughton v. Adkins*, 1 Pick. (Mass.) 535, 544; *Jackson v. Holloway*, 7 Johns. (N. Y.) 295; *McPherson v. Clark*, 3 Bradf. (N. Y.) 99; *Sutton v. Sutton* (1778), Cowp. 812, 814; *Gastrell v. Smith*, 4 East, 419; *Kirke v. Kirke* (1828), 4 Russ. 435; *Locke v. James*, 11 M. & W. 901, 911; *Pringle v. McPherson*, 2 Brev. (S. C., 1809), 279, 920. The testatrix dictated some alterations in her will, tore off a part of the will and burned it, and placed the torn will in a drawer with the memorandum which she had dictated. The portion of the will which

A peculiar case of conditional revocation occurs where a testator, after having executed a will, *expressly revokes it* by another will and then *destroys the latter*, with the intention that the *former shall revive*. In such case the intention to revoke was conditional upon the revival of the substituted writing, and if this be impossible under existing rules of law,¹ the destruction of the latter will does not revoke it.² Such a case does not differ in principle from a revocation coupled with an intention to execute another will at a future time, in which the testator is prevented by an unavoidable accident.

§ 253. Revocation based upon a mistaken assumption or belief of fact.—It sometimes happens that a devise is revoked for reasons which are based upon an erroneous assumption by the testator of the truth of certain facts which do not exist. The testator, in revoking his will, has acted under a belief in the reality of these facts, while the facts do not exist as he believes they do. If the testator states his reasons for the revocation, and it appears the revocation would not have taken place had not the testator been mistaken in his belief, the revocation will be regarded and treated as contingent and conditional upon the reality of the facts assumed by the testator.³ In such case the revocation is not out and out, but only conditional. It is not absolute unless the facts which furnish a basis for it are as the testator supposed them to be.

Accordingly where the testator, being under the impression that certain legatees in his will were dead, executed a codicil in which he revoked the legacies to them, stating as his reason for this action "they were all dead," and it turned out that they were all living, it was held that the revocation, being conditional upon their being dead, was ineffective.⁴ Again, in a case where the testator, after giving an estate to A. for life, with remainder to his sons in tail, revoked the devise by a codicil stating that A. had died without leaving issue, the revok-

was in the drawer contained the signatures of the witnesses and of the testator, and the latter, believing that the new papers constituted a will, did not execute it. *Held*, a case of dependent conditional revocation, and probate was granted of the will, including the part which had been destroyed. *Dancer v. Crabb*, L. R. 8 P. & D. (1873), 98, 104.

¹ *Post*, § 269.

² *Powell v. Powell*, L. R. 1 P. & D. 209, 213; *Dickinson v. Swatman*, 30 L. J., P. M. & A. 84.

³ Compare *ante*, § 252.

⁴ *Campbell v. French*, 3 Ves. 821.

ing codicil was not sustained when it appeared that though A. was dead he had left a child. The testator when he executed the codicil knew nothing of the birth of the child, and it was equally clear that if he had he would hardly have given the property to others by a codicil.¹ A different construction will be had where the revocation of the devise, instead of being based upon a positive belief that the legatees are dead, or upon an assumption that they are so, is revoked merely because the testator is *in doubt* whether they are alive. Thus, if the testator gives a legacy to A., and then in a codicil says he gives the same article or legacy to B., as he doubts or does not know whether A. is alive, or that he thinks perhaps that A. may not need it, the revocation is complete.²

Another case of revocation based upon a mistaken belief occurs where the testator, believing, after taking counsel, that a former devise is invalid, revokes it and gives the property to others, and it is subsequently ascertained that the former devise was valid. Under such circumstances the first will is conclusively presumed to be revoked, upon the theory that every one is presumed to know the law; and that the mistake which underlies the erroneous revocation was a mistake of law and not of fact, as in the cases previously mentioned where the revocation was founded upon the belief that a legatee was dead.³ The rule is intended to carry out the intention of the testator, and if from all the circumstances and the language of the will it is clearly apparent that he intended to revoke his will, it is not always material that the reason which he assigns for doing so is based upon a mistake of fact. The rule has no application if it appears from the revoking instrument that the testator, acting on facts which were within his own knowledge, intended to determine for himself the existence or non-existence of the facts upon which the revocation is based.⁴ Thus, where the testator revoked a devise to his daughter, stating as his reason for so doing that he had made a gift of nearly the same value to her husband, when in fact he had made him no

¹ *Evans v. Evans*, 10 Ad. & Ell. 228.
Cf. Dunham v. Averill, 45 Conn. 61,
81.

² *Attorney-General v. Ward*, 3 Ves.
327.

³ *Attorney-General v. Lloyd*, 3 Atk.
(1747), 551, 553, 1 Ves. 32.

⁴ *Giddings v. Giddings*, 65 Conn.
(1894), 149, 158; *Hayes v. Hayes*, 45 N.
J. Eq. 461.

gift, but had sold certain property to the husband, the revocation was held absolute; the court holding that, in view of the intention of the testator to make an equal division, he had a right to regard it as an advancement, though it was not technically such in law.¹

If the testator has given no reason for the revocation or no statement of his motives, or has stated no fact which proved to be false, the court cannot receive parol evidence merely tending to show that a revocation was the result of a mistaken recollection as to the number of legacies given.²

§ 254. The English doctrine of revocation by an invalid conveyance.—Prior to the passage of the statute 1 Vict. 26, c. 20, which provided that a will could only be revoked by another will, or by some writing declaring an intention to revoke it, or by burning, tearing or otherwise destroying it, it was the law in England that a subsequent conveyance of either real or personal property which had been disposed of by a will would operate to revoke the latter, *though the conveyance turned out to be void and inoperative*. An example of this was a conveyance which failed to operate because of a lack of capacity in the grantee to take or to hold the property, as when a man made a gift of personal property to his wife which he had bequeathed to her in a prior will,³ which was inoperative under the rules of law. The rule also was applied where a conveyance of real property was invalid because of the failure of the person conveying or receiving the same to observe some formality requisite to its valid transfer; as where a testator, having devised an estate of freehold, attempted to convey it without livery of seizin, which, at the common law, was necessary to create an estate of freehold,⁴ or conveyed by a deed of bargain and sale without enrollment, as required by statute,⁵ or granted a

¹ Mendenhall's Appeal, 124 Pa. St. 387, 398, 23 W. N. C. 379, 16 Atl. R. 881. Thus, where the testator, having devised land to A. and B., executed a codicil in which, after declaring that the land devised to A. and B. had been sold, he devised the proceeds of the land sold to A. and revoked the devise to B., it was held that the revocation was effectual, though the land devised to B. had

never in fact been sold, but belonged to the testator at the date of his death. *Giddings v. Giddings*, 65 Conn. 149, 158, 32 Atl. R. 334.

² *Dunham v. Averill*, 45 Conn. 61, 81 (1877).

³ *Beard v. Beard*, 8 Atk. 72.

⁴ 2 Black. Com. 314.

⁵ 27 Hen. VIII., c. 16; *Montague v. Jeffries*, Moor. 429, pl. 599.

copyhold estate by a deed without a surrender to the lord of the manor,¹ or endeavored to bar an estate-tail by a common recovery which was void on account of an informality in the proceedings.² In all these cases, though the attempted transfer of the interest of the testator was inoperative and totally ineffectual to vest a title, it was conclusively regarded as a revocation of a prior bequest or devise of the same property. Whether a conveyance of real or personal property executed with all the requisite statutory formalities and which is valid at law, but which may be subsequently set aside in equity as having been procured by fraud, coercion or undue influence, will operate as a revocation of a prior devise of the same property, was the subject of much litigation in courts of equity. The English cases sustain the affirmative; and the devise was regarded as revoked, though the deed was subsequently canceled in equity.³ The English rule is not of much present importance in America, when a will by statute carries all property owned by the testator at his death, and when a general devise includes after-acquired land. The will speaks from the death of the testator unless a contrary intention is clearly shown, and a specific devise of real estate will carry the title to the property devised, irrespective of the fact that the testator had parted with the legal title and re-acquired it as the result of a suit in equity, brought after the execution of the will, to set aside the deed because of fraud or undue influence.⁴

§ 255. The revocation of the appointment of an executor.

A clause expressly revoking all former wills operates as a revocation of the appointment of the executors named in them. So, too, the appointment in a codicil of a person as the "*sole*" executor will revoke the appointment of two or more executors in a will.⁵ In England it has also been held, where a testator appointed A. his residuary legatee *and* his executor, and subsequently by a codicil gave everything to his wife (without expressly revoking the appointment of A. as executor), that the

¹ Vawser v. Jeffery, 2 Sw. 268, 274. N. W. R. 697; Smithwick v. Jordan,

² Doe v. Bishop of Llandaff, 2 B. & 15 Mass. (1818), 113, 115; 2 Greenl. on Evid., § 687; 1 Redf., § 344. See *ante*, P. N. R. 491.

³ Hawes v. Wyatt, 8 Brown Ch. 156, § 48.

⁴ 2 Cox. 263; Simpson v. Walker, 5 ⁵ In re Lowe, 3 Sw. & Tr. (1864), 478; Simons, 1; Hick v. Mors, Amb. 215. In re Baily (1869), L. R. 1 P. & D. 628,

⁶ Graham v. Birch, 47 Minn. 171, 49 629.

will was not only revoked as to the disposition of the property, but as to the executor as well.¹

But a codicil which, by an inconsistent disposition, wholly revokes the dispositive portion of a will, and which contains *no revocation clause*, does not revoke the appointment of the executor made in the will, though the will and codicil must be admitted to probate together, to be carried out by the executor named in the will.² So, too, where the testator executes a will giving *all or a portion of his property to A.* and appoints him or B. an executor, and by a subsequent will gives a portion of his property to others and appoints C. executor of the latter will, but does not expressly revoke the former, *both* wills ought to be admitted to probate and *both* executors permitted to qualify.³

Where the same person is nominated by the testator to fill the offices of trustee and executor, an express revocation of his appointment so far as one office is concerned will not amount to a revocation of the other.⁴ If, however, the testator has appointed the *same persons both trustees and executors* and has directed them, *as trustees*, to attend to the payment of debts, legacies and funeral expenses, which is usually within the office of an executor, his revocation of the appointment of one of them as trustee will operate as a revocation of his appointment as executor.⁵ Legacies given to trustees and executors not *virtute officii*, but as a mark of the personal respect of the testator for them,⁶ are not revoked, by implication, by a codicil transferring the property to other trustees upon the same trusts,

¹ *Henfrey v. Henfrey*, 2 Curteis, 468. The same rule was applied where the testator made his wife "universal heiress" by an Italian will and expressly revoked all former wills. *Cottrell v. Cottrell* (1872), L. R. 2 P. & D. 397, 399.

² *Newcomb v. Webster*, 113 N. Y. 191, 21 N. E. R. 77. *Henfrey v. Henfrey*, *supra*, seems to be to the contrary.

³ *Geaves v. Price*, 32 L. J. Prob. 113 (1863), 2 Sw. & Tr. 71; *In re Leese*, 2 Sw. & Tr. 442, 81 L. J. Prob. 169; *In re Graham*, 32 L. J. Prob. 118; *In re*

Morgan, L. R. 1 P. & D. 323; *Richards v. Queen's Proctor*, 18 Jur. 540, 542. The necessity for the appointment of an executor, *ante*, § 7. The duties of an executor are explained *post*, §§ 783, 784.

⁴ *Graham v. Graham*, 16 Beav. 550, 554; *In re Park*, 14 Sim. 89, 91; *Fry v. Fry*, 9 Jurist, 894, 896; *Worley v. Worley*, 18 Beav. 58, 59; *Cartwright v. Shephard*, 17 Beav. 301, 303.

⁵ *Barrett v. Wilkins*, 5 Jur. (N. S.) 687.

⁶ *Post*, § 643.

even though he gives similiar legacies to the new trustees, *also* as a mark of respect.¹

§ 256. **The question of revocation in the case of several wills of uncertain date.**— Where two or more wills, or a will and a codicil, properly executed, but *undated*, or of the *same* date, are discovered at the death of the testator, difficulty will naturally be experienced in ascertaining which speaks his final intention.² Parol evidence, including the declarations of the testator,³ to show the dates of the wills, or to show the order of their execution in point of time, is admissible. The evidence of experts in handwriting would also be received for the same purpose.⁴

The various instruments may be consulted, and a clear reference contained in one of them to another as existing would be conclusive evidence that the instrument thus referring had been executed subsequently to the one to which it referred.⁵ If it is impossible for the court, after considering all available extrinsic evidence, and an attentive perusal and comparison of the writings, to determine which is the later or latest, all must of necessity be void, so far at least as they are irreconcilably inconsistent, and the deceased is intestate.⁶ But when a man makes one will, and, *a fortiori*, when he has made several wills, the presumption that he intends to die testate is always recognized. His attempts to formulate a testamentary plan ought to be supported and sustained if by any possibility the court is able to do so. If two or more inconsistent wills are found, the last is not a revocation of the others preceding it unless it is shown to have been properly executed.

The expression, "last will," or "this is my last will," contained in one of several wills, raises no presumption whatever of a revocation as regards the wills which antedate the instrument in which it is contained. It means only that one will was executed after the others; and for this reason, where several wills are found, *each* purporting to be a last will, but all

¹ *Burgess v. Burgess*, 1 Coll. 367, 369.

² As to dating a will, see *ante*, § 181.

³ *In re Purdy*, 20 N. Y. Supp. 307, 308.

⁴ *Ante*, § 181.

⁵ *Post*, § 281.

⁶ *In re Purdy's Will*, 20 N. Y. Supp. 307, 308; *Wms. Ex'rs*, p. 66. So held where two inconsistent wills of the same date were found. *Phipps v. Anglesey* (1751), 5 Brown's Parl. Cases, 45, 57. See *ante*, § 247.

of which may be carried out in part, all the papers should be admitted to probate, as forming *together one* last will.¹

§ 257. **When the revocation of a codicil may be presumed from the revocation of a will.**—Where the deceased executes a will and then executes several codicils in terms referring to it, and one or more of the codicils are found among his papers at his decease, but the will has either wholly disappeared, or is shown to have been revoked by the testator, the question arises, shall the codicil or codicils be admitted to probate?² Many English cases in which this question has arisen recognized a presumption of the revocation of the codicil from the fact of the revocation of the will. It was assumed, and doubtless in most instances with truth, that the testator intended to revoke the codicil at the time of destroying the will, but that he had been prevented from so doing either by accident, oversight, or some circumstance over which he had no control; or because he erroneously believed its destruction was unnecessary to work its revocation. And the presumption of revocation of the codicil was materially strengthened if it appeared by proof that the provisions of the will which had been destroyed, and of the codicil which had been preserved, *were blended and interdependent, so that neither could be properly carried out without the other.*³

Other more recent English cases place very little dependence upon the inseparable nature of the provisions of the will and those of the codicil, and refuse to recognize a presumption of revocation under these circumstances. The statute points out not only how a will, but also how a codicil, may and *must* be revoked; and the statutory mode must be followed, and the codicil must, if actually in the possession of the testator, be in fact destroyed.⁴ That the codicil is unintelligible without the

¹ *Graham v. Burch*, 28 Am. St. R. Notes Cases, 623, 625, 13 Jur. 422; 353; *Gordon v. Whitlock*, 92 Va. 723, *Coppin v. Dillon*, 4 Hagg. 361, 369; 729; *Lemage v. Goodban*, L. R. 1 P. Medlycott v. Assheton, 2 Addams, & D. 57; *In re De la Sausaye*, 3 id. 229, 231 (1824); *Ustick v. Bawden*, 2 42; *In re Petchell*, 3 id. 153; *Leslie v. Add.* 116, 129.

Leslie, 6 Ir. R. Eq. 332; *post*, § 282.

² *Post*, § 272.

³ *Black v. Jopling*, L. R. 1 P. & M. Turner, L. R. 2 P. & D. 403, 27 L. T. 685; *In re Halliwell*, 4 Notes Cases, (N. S.) 822; *In re Dutton*, 3 Sw. & 400, 401; *Clogstoun v. Wallcott*, 5 Tr. 66, 69.

⁴ *In re Savage*, L. R. 2 P. & D. 78, 79, 39 L. J. Prob. 25; *In the Goods of*

will is not relevant upon an application to probate the former. To construe the codicil, and to determine how far its provisions are legal, valid and intelligible, are not the duties of a judge of probate, but appertain exclusively to a court of construction, which cannot act until the script has been admitted to probate.¹

§ 258. Insertion of a revocation clause by mistake — Revocation by express words of wills executing powers.— Where, upon all the evidence which is before the court, it appears that a clause of revocation was inserted or permitted to remain in a will by mistake, it may be *totally ignored* and the will *probated without it*.² Thus, where the testator had executed two wills on printed forms, *both undated* and *both containing revocation clauses*, the court, upon *clear* proof that one of them was intended by the testator as an addition to the other, admitted both to probate.³

But the evidence that the testator did not intend that the clause of revocation in a later will should operate upon a former will must be clear and convincing. If the will, including the printed clause of revocation, was read to and approved by him, and he then signed it with a full knowledge of its contents, it will be presumed that he intended to revoke his former will.⁴

¹ Post, §§ 458, 459. A paper purporting to be a codicil to the last will of the testator, validly executed, was admitted to probate, though no trace of the last will could be found, and though the testator, when he executed the codicil, *absolutely refused to give any information* whatever as to the existence, nature or whereabouts of his last will. In the Goods of Coulthard, 11 Jur. (N. S.) 184; In the Goods of Clements, L. R. Prob. (1892), 254, 255; Gardiner v. Coulthorpe (1896), L. R. Prob. 14, 17. It has been held that the destruction of a codicil by the testator will *not operate as a revocation* of a will to which it related, though the testator was not able to destroy the will itself, as he intended and desired, for the reason that, *when he destroyed the codicil*, the will was de-

posited in the hands of other persons for safe keeping. Malone v. Hobbs, 1 Rob. (Va., 1842), 346, 385.

² Gelbke v. Gelbke, 88 Ala. 427, 6 S. R. 884.

³ In re Purdy's Will, 20 N. Y. Supp. 307. The sole surviving witness testified that an interval of three months had intervened between the execution of the papers, and that, when the last was executed, the testator said: "I have changed my will,—added to it. . . . This is another part of my will—an addition. I have some other things to will away." See also, sustaining the same rule, Powell v. Moutohett, 6 Madd. 216.

⁴ On the danger of using printed forms, see ante, § 180. In Collins v. Elston, 1 Reports, 458 (1893), a testatrix, after the execution of a will, re-

The general application of a revocation clause may sometimes be limited by circumstances from which it must be presumed that the testator did not intend it to operate literally.¹ Thus, where the testator executes a will by virtue of a special power to appoint by will, in language referring to the power, and subsequently executes a will disposing of his own property, containing a clause *expressly revoking all* former wills, the revocation will not take effect upon the will executed under the power.² And the fact that, by a statute, a bequest in general terms, not referring to the existence or execution of a power, will be regarded as a valid execution of a power to appoint by will, does not alter the case so that a revocation in general terms, not referring to the will made under a power, will revoke it.³

§ 259. The revocation, by inconsistent disposition, of testamentary appointments.—As a rule, where a power of appointment is once *fully executed*, the power is exhausted, and cannot be executed again by the appointor.⁴ But where a per-

ceived a sum of money which she disposed of in a will written upon a blank form containing a clause of revocation, which was allowed to remain under a misapprehension as to its effect. It was held that *her existing will was revoked*. The court proceeded upon the presumption that the testatrix approved of the revocation clause, from proof that the whole will was read to her. Under somewhat similar circumstances, where the revocation clause in a codicil written upon a printed form was *not read* to the testator nor the blanks in it filled up, the court admitted both will and codicil to probate, *omitting the revocation clause from the codicil*. In *re Goods of Moore* (1892), Prob. 378. See also In *re Oswald*, L. R. 3 P. & D. 163, 164.

¹ But *cf. ante*, §§ 248-250.

² *Hughes v. Turner* (1832), 4 Hagg. 52, 61. *Cf. Denny v. Barton* (1818), 2 Phill. 575, 577.

³ In *re Merritt* (1858), 1 Sw. & Tr. 112, 117, 4 Jur. 1192; In *re Joys*, 30 L.

J. Prob. 169; In *re Meredith*, 29 L. J. Prob. 155. But where the second will is executed under the same power as the former will, and expressly refers to the power, a general revocation contained in it will revoke the former will. In *re Eustace*, L. R. 3 P. & D. 183; *Lang v. Barry*, 3 Hagg. 249. The rule that the donee of a power cannot revoke the appointment, though contained in an instrument which is *per se* revocable, is based upon the fact that, by executing a special power or a power in trust, the donee is disposing of property belonging to *another* than himself. He may, of course, revoke the execution of the power, if the power of revocation be reserved to him or is expressly conferred upon him by the donor. Unless such is the case, the appointees must take under the original instrument creating in him the power. 2 Sugden on Powers, 243; Co. Lit. 271b.

⁴ Sugden on Powers, 342; 4 Cruise's Dig. 400, 401.

son who has, by a deed, a power "to appoint by will or *by other written instrument*," disposes of the property over which he has the power by a will, and subsequently by a deed makes a disposition of the same property to others, the will is revoked by the deed.¹ So, too, it was held in an English case, where a married woman appointed property by will, as she might legally do by virtue of a marriage settlement, and after the death of her husband took a conveyance from the trustees to herself in fee, by which she became vested with the legal title to the fee as though she were a *feme sole*, that the prior will made in execution of the power was revoked.² But a will executed under a power is not revoked by a subsequent execution of a power of sale or a power to appoint by deed, where the execution of the latter is rescinded, and the parties are restored to their original condition. Thus, where one appointed property by a will under a power, and subsequently sold the property, but it was afterwards conveyed in trust for the appointor of the power, with the same provisions in the deed of trust as the appointor had under the original settlement, it was held that the sale was not a revocation of the will.³

§ 260. Revocatory wills not disposing of property.—An instrument, if properly executed and signed as a will, though merely revoking prior wills, though appointing no executors⁴ and making no disposition of the estate of the testator, is a valid will, and should be admitted to probate.⁵ Thus, where a testator wrote on the bottom of a will: "This is hereby canceled, and as yet I have made no other;"⁶ or wrote a paper to the effect that he wished to revoke his existing will and to die intestate, so "that all my property may devolve upon my heirs and next of kin;"⁷ or a paper in which he stated that he added it to his will, "hereby revoking all other codicils,"⁸

¹ *Paine v. Forsaith*, 30 Atl. R. 11 (1894), 86 Me. 357, 362. Cf. *Reid v. Boushall*, 107 N. C. 345, 12 S. E. R. 345.

² *Lawrence v. Wallis*, 2 Brown Ch. R. (1788), 320.

³ *Burkett v. Whittemore*, 36 S. C. 428, 436, 443, 15 S. E. R. 616. But Judge McIver dissented, upon the ground that the power to appoint by will having been exhausted was gone forever, and that a power to devise

created by the deed of trust could not be executed by a will made many years prior to its creation. See also *post*, §§ 798–807.

⁴ *Ante*, § 6.

⁵ *Brenchley v. Still*, 2 Rob. 162, 168.

⁶ *In re Hicks*, L. R. 1 P. & M. 683, 684.

⁷ *Brenchley v. Still*, 2 Rob. 162.

⁸ *In re Hubbard*, L. R. 1 P. & D. 53, 54. But see *contra*, *In the Goods of*

probate was granted of the instrument as a will, though no property was disposed of in it.¹

§ 261. **Revocatory effect of the destruction of one of several wills executed in duplicate.**—The English custom mentioned by Mr. Jarman of executing a will in duplicate for the purpose of preventing or avoiding the inconvenience which may arise in case the will is lost or mislaid is certainly to be commended. Where the will is thus executed the testator commonly retains one copy, depositing the other with the executor or solicitor, or placing it in some other safe place. Suppose, under such circumstances, the testator wishes to revoke his will. If the testator has retained one copy, placing another in the hands of another person; and if the copy, which it is shown he has never parted with, cannot be found upon his death,² or if, when it is found, it is torn or canceled, the presumption is that the will is *wholly revoked*, even though a duplicate is produced intact.³ This presumption that the testator destroyed the will, and that he did so *animo revocandi*, is *prima facie* only. It may be rebutted by proof that it was in fact destroyed by another, and that the intention to destroy it was never present with the testator.⁴

Fraser, L. R. 2 P. & D. 40, 41, 41 L. T. 80.

¹ In the Goods of Lancaster, 1 Sw. & Tr. 464, the testatrix revoked all former wills, appointed an executor and disposed of certain property she held in trust, stating that it was all she owned. The court, holding that the general clause of revocation was by implication a gift of the personal property not expressly mentioned in the will to the next of kin, granted general probate. In Goods of Leson, 1 Sw. & T. (1859), 464; Brenchley v. Lynn, 2 Rob. 468. See *ante*, § 5, and *post*, § 266.

² As in Colvin v. Fraser, 2 Hagg. 266, 329.

³ Colvin v. Fraser, *supra*; Limbery v. Mason, 2 Comyns, 453; Burtenshaw v. Gilbert, 1 Cowp. 49, 53, 54; Pemberton v. Pemberton, 13 Ves. 289, 308, 310; Welsh v. Gowland, Freq. Mich.

Term, 1804, cited 2 Hagg. 330; Richards v. Mumford, 2 Phill. (1813), 23, 30; Boughy v. Moreton (1758), 3 Hagg. 191, 192; Atkinson v. Morris, L. R. Prob. (1896), 40, 46.

⁴ *Post*, § 272. Where a will is found at the death of the testator, his declarations that he had executed that will in duplicate are inadmissible, under the rule that the execution of a will cannot be proved by hearsay evidence. Atkinson v. Morris, L. R. Prob. (1896), 40, 48. In Burtenshaw v. Gilbert, Cowp. 49, 53-55, the testator, after making a will in duplicate, executed another in terms revoking it, and canceled the copy of the first which was in his possession. After his death both wills were found canceled, but a copy of the first was also found uncanceled. It was held that the cancellation of the second will did not revive the first. Onions

If it appears that the testator always had *both copies in his possession* and *one* cannot be found at his death, the other being found intact, the same presumption is recognized, though weaker.¹ And the presumption is weaker still where *both* copies or parts of the will are found in the possession of the testator at his death, one canceled and the other intact, for the testator always had it in his power to effect a complete destruction of both; and the fact that he did not do so may show that he did not intend a revocation, or that, contemplating a revocation by the destruction of both, he changed his mind and left it incomplete.² Where the testator, having *both parts* in his possession, expressly revokes *one* and destroys it by burning it, while preserving the other, no presumption arises that a revocation was intended.³

Where a will is executed in duplicate, the testator retaining one part and the other being deposited with another person, an obliteration or interlineation by the testator in or upon the part which is under his control will, if effective at all, operate upon both parts.⁴ So, too, where a will and one of the codicils attached to it contain identical provisions, so that the one is *pro tanto* the duplicate of the other, it has been held that the cancellation of the codicil by the testator would operate as a cancellation of the duplicate clause in the will which had been overlooked by him.⁵ But generally the destruction of a codicil will not amount to the revocation of a will to which it refers, even when⁶ the will is deposited with one person and the

v. Tyrer, 1 P. Wms. 343, 346; Burtenshaw v. Gilbert, Cowp. (1774), 49, 52; Seymour's Case, 2 Vern. 742, 1 Eq. Cas. Ab. 408. In Hide v. Mason, 8 Vin. Abr., p. 140, pl. 17, cited in Goodright v. Glazier, 4 Burr. 2512, the testator made a will in duplicate, keeping one copy and delivering one to the executor. He afterward made many radical alterations in the copy he had, and wrote a new will nearly corresponding with his copy as altered, but never executed the new will, nor did he ever obtain the copy of the old will, which was in the hands of the executor. It was held that the alterations were tentative merely, and that the will was not

revoked, the court inferring an intention that the first will was not to be destroyed until the second was complete from the fact of the executor retaining his copy.

¹ Pemberton v. Pemberton, 13 Ves. 289, 310.

² Pemberton v. Pemberton, 13 Ves. 289, 310; Roberts v. Rounds, 3 Hagg. 348.

³ In re Haines, 5 Notes Cas. 621, 622.

⁴ Doe d. Strickland v. Strickland, 8 C. B. 724.

⁵ Utterson v. Utterson, 3 Ves. & B. 122.

⁶ As in Malone v. Hobbs, 1 Rob. (Va., 1842), 346, 385.

codicil with another, and the testator destroys the latter but makes no attempt to obtain the former, and consequently it is preserved intact until his death.¹

§ 262. The effect of the death of a legatee on the will.—

It is hardly necessary to say that the death of a legatee before the death of the testator does not amount to a revocation of the will.² If the person who dies is the *sole legatee*, the will may still be probated in order that the executor may thereby have proper and legal authority conferred upon him to settle the affairs of the deceased, and to pay his debts and funeral expenses. He will be regarded as a trustee for the next of kin as to all surplus personal estate which may remain in his hands, and this he will distribute among them under the direction of the surrogate's court.³ In case one of several legatees shall die, whose interests are several, the legacy will lapse except in those cases where the common-law rule of lapse has been abolished by express statutory enactment.⁴

§ 263. Revocation not implied from subsequent insanity of the testator.—The question has been raised whether the long-continued insanity of the testator, beginning subsequent to the execution of a will, operates as an implied revocation. A will of course is revocable to the last moment of a man's life. He may revoke it at any time, but there is no rule of law which says he must do so, and implies a revocation in case he is not able to revoke it. If he shall not revoke the will while he has capacity, he cannot do it when he has no capacity,⁵ and what he did *not* do when he could, the *law will not do for him when he cannot*. Hence, though the cases are by no means numerous, it is settled on grounds of reason and sense that the insanity of the testator *after the execution of a will, continued down to the date of his death*, is not such an alteration of circumstances as will amount to a revocation.⁶

¹ Distinguishing *Utterson v. Utterson*, 3 V. & B. 122. *Cf. ante*, § 257.

² *Doe v. Edlin*, 4 Ad. & E. 586; *Hoitt v. Hoitt*, 63 N. H. 475, 479, 1 Amer. Pro. R. 529, 533.

³ *Cf. ante*, § 5.

⁴ The subject of Lapse is treated *post*, § 324 et seq.

⁵ *Ante*, § 224.

⁶ *Warner v. Beach*, 4 Gray (Mass.), 162, 163. In *Forse's Case*, 4 Coke, 61b, decided in the year 1589, though this question did not come in issue, the court said: "When a man of sound memory makes a will, and afterwards, by the visitation of God, becomes of unsound memory (as every man for the most part before

§ 264. **Whether the adoption of a child by the testator will revoke the will.**—The status of an adopted child as one of a class designated, as children, heirs, issue, or next of kin, is discussed elsewhere.¹ It is pointed out that where a statute gives him the right of an heir or of a child of the person adopting him, he will take under a will devising property to the “heirs” or “children” of the adopting parent. In the absence of a statutory provision, the adopted child will *not* take under a devise to any class of relations, unless the intention of the testator that he shall so take clearly appears on the face of the will.

We will now consider to what extent the adoption of a child *subsequent* to the execution of a will in which he is not provided for will operate as a revocation. In the majority of cases where a child is adopted *after the execution of a will* by the adopting parent, it is clearly the intention of the latter, in case he does not make some provision for the adopted child in life, that on his death the child shall receive some share of his estate. Where the statute regulating the subject of adoption provides that the person adopted shall have *all the rights of a child and heir*, it would seem that, in those states where the rights of children omitted from the will are protected by a statute, the adopted child might avail himself of such statutes, and secure a share of the estate of the adopting parent.² But it is conclusively settled by numerous cases which construe

his death is), God forbid that this act of God should be in law a revocation of his will, which he made when he was of good and perfect memory.” In the Massachusetts case cited, Judge Shaw remarked: “The only other circumstances intimated as ground of revocation are the increase in value of the real estate, and the long-continued insanity of the testator which disabled him from altering a will. The former circumstance would have no weight alone, and it is only the great length of time during which this disability lasted which appears to give it any plausibility. It is said that a will is ambulatory during the life of

the testator because he may alter it or change it. If this could be held to mean that he must always have the capacity to revoke, it would follow that any attack of insanity would operate as a revocation, which would prove far too much. And we have no law, no rule or maxim, intimating a distinction in this respect between the existence of insanity for a longer or shorter period of duration. No case was cited by counsel, and we are aware of none, where any insanity after making a will is held to revoke the will.” See also *Hughes v. Hughes*, 2 Munf. (Va., 1811), 209.

¹ *Post*, § 550.

² See §§ 240–243.

the statutes, which provide that, if the testator shall have *born* to him issue which shall survive him, the *birth of such issue* will operate as a revocation of the will, that *the adoption of a child* does not fulfill the statutory requirements, though by statute he has the right of a child in the estate of the parent by *descent or otherwise*.¹

§ 265. **Revocation by implication from divorce.**— Whether the decree of a court granting an absolute divorce or a judicial separation shall operate as an implied revocation of the will of either party to the marriage so far as it favors the other depends wholly upon the express decision of the court as contained therein. If the decree provide for the payment of alimony by the husband, it may also provide that the alimony shall be *in lieu* of any testamentary provision made for the wife and in lieu of her distributive share in the estate of the husband. So, where the wife obtained an absolute divorce, and the husband conveyed to her a large amount of property, and they, by a mutual settlement, terminated their property as well as their marital relations, a will made in favor of the wife was by implication revoked.² But, in a case where a husband obtained an absolute divorce from his wife, in whose favor he had made a will, and died five years later, it was held that the will, though made in contemplation of marriage, was neither conditioned upon the marriage nor upon the survivorship of the wife *as the widow of the testator*, and that, on this account, the divorce was not an implied revocation. The wife certainly lost her dower and consequently her right of electing;³ but the devise, being absolute and unconditional, could not be regarded as revoked by implication, particularly where the husband had enjoyed ample opportunity to revoke it expressly in one of the statutory modes, but had failed to do so.⁴ Elsewhere, also, it has been held that a revocation cannot be implied from an

¹ *Davis v. Fogle*, 124 Ind. 41, 23 N. E. R. 860; *In re Gregory's Estate*, 37 N. Y. S. 925, 15 Misc. R. 407; *In re Comassi's Estate*, 107 Cal. 1, 40 Pac. R. 15.

² *Lansing v. Haines*, 95 Mich. (1893), 16, 20, 54 N. W. R. 699. If this were not so, it might happen that, if the husband married again and left a

widow and children, *they* would be absolutely unprovided for upon his death; while she, who had been well provided for in his life, would by the will receive the remainder of his property.

³ *Post*, § 744.

⁴ *Charlton v. Miller*, 27 Ohio St. (1875), 298, 305.

absolute divorce where a wife, who is provided for in a will, obtains a divorce from her husband, particularly where the children are provided for in the same will.¹

§ 266. **The revocatory effect of lost wills.**—Where a will, proved to have been executed, is shown to have been lost or to have been destroyed by the testator, or some other person, without an intention to revoke it, it will *not be presumed, in the absence of proof, that it contained an express clause of revocation*. An existing will, which antedates the lost will, is, in the absence of proof that the latter contained a clause of revocation, only revoked by it so far as the provisions of the lost will, as they are proved, are irreconcilably inconsistent with the first will. All the contents of the lost will need not be proved, if enough is proved to show that it revoked the former one.² Thus a will, expressly revoking all former wills, is valid as a revoking instrument, though the contents of the will itself, so far as it disposes of property, are unknown and cannot be proved because of the loss or destruction of the will.³ If the court is satisfied that the subsequent will was properly executed, the revocation clause may be proved in opposition to an application to probate an earlier will,⁴ even though the revocatory writing, which was lost, has never been admitted to probate.⁵

¹ Baacke v. Baacke (Neb.), 69 N. W. R. 303. See also *post*, §§ 601, 602, as to gifts to the husband or wife. A testator declared that A., who was the child of his wife born to her *after her adultery*, for which the testator was then seeking a divorce, was not his child and should take no part of his estate. Subsequently, in compromise of an action brought against him to procure support for A., he entered into an agreement, in which it was recited that A. was his lawful child born in lawful wedlock, and he agreed to support her and did so for some time. He also, contemplating a future marriage, executed a codicil which appointed guardians of any of his children who might survive him, and at that time he had no child but A. The codicil made no change in the legacies given, and the agree-

ment to support A. was the result of advice that the testator was legally responsible for her support. *Held*, that the will was not revoked. *In re Padelford* (Pa., 1899), 42 Atl. R. 381.

² Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158, 165; Hutchins v. Bassett, Comb. 91, 3 Mod. 203; Harwood v. Goodright, Cowp. 87; Brown v. Brown, 8 Ell. & Bl. 876, 886 et seq. And see also *post*, §§ 270, 278.

³ *Ante*, § 260.

⁴ *In re Cunningham*, 38 Minn. (1888), 169, 172, 36 N. W. R. 269; Brown v. Brown, 8 Ell. & B. 876, 886.

⁵ *In re Cunningham*, 38 Minn. 169, 172, 36 N. W. R. 269; Barksdale v. Hopkins, 23 Ga. (1857), 332; Stevens v. Hope, 53 Mich. 65, 17 N. W. R. 698; Nelson v. McGiffert, 3 Barb. Ch. (1854), 158, 164, 49 Am. Dec. 170; Rudy v. Ulrich, 69 Pa. St. 177. *Cf.*

A will, the dispositive part of which is rendered void by its fraudulent destruction by one other than the testator, may, so far as its dispositions were inconsistent with a former will, operate as a revocation of such former will.¹ And where the former will, which is revoked, was in favor of the person who fraudulently destroyed the later will, the court and jury may of right make every presumption in favor of the revocation *in odium spoliatoris*.²

§ 267. The effect of alterations by strangers and persons interested.—Alterations of any sort made in a will by a stranger to it, without the knowledge of the testator, have no effect whatever, and the instrument must be admitted to probate as it stood originally.³ Such changes are a mere spoliation, and parol evidence will always be received to show the original contents of the will.⁴

Where an alteration is made by a party claiming under the will, the will is void, though only so far as it would have benefited him.⁵ Where it appears that a will, showing a material alteration upon its face, was during the life of the testator in the possession of a party who would profit by the alteration, and, *a fortiori*, if this was the case after his death, the party will be called upon to explain the alteration and to show that it was made before execution, or, if made subsequently, that he did not make it.⁶

Sewall v. Robbins, 139 Mass. (1885), 164.

¹ Jones v. Murphy, 8 Watts & S. (Pa., 1844), 275, 301.

² Betts v. Jackson, 6 Wend. (N. Y.) 180, 181; *post*, § 267.

³ Smith v. Fenner, 1 Gall. (1813, U. S. C. C.) 170, 174; Grubbs v. McDonald, 91 Pa. St. 236, 241; Camp v. Shaw, 52 Ill. App. 241, 249; Doane v. Hadlock, 42 Me. 72; Jackson v. Malin, 15 Johns. (N. Y.) 293, 298; Holman v. Riddle, 8 Ohio St. (1838), 384, 389.

⁴ See cases cited in last note.

⁵ Jones v. Murphy, 8 Watts & S. (Pa., 1844), 275, 301, 302; Betts v. Jackson, 6 Wend. (N. Y.) 180, 181.

⁶ In re Wilson, 8 Wis. (1859), 171, 179; McIntire v. McIntire, 8 Mackey

(19 D. C.), 482. In this connection compare the following cases which support the rule that a party suing upon a deed which has been altered is bound to explain the alteration, and to show that it is an innocent one, made before execution. Morris' Lessee v. Vanderen, 1 Dall. (U. S., 1782), 64; Wilde v. Armsby, 6 Cush. (Mass.) 314, 319; Jackson v. Osborn, 2 Wend. (N. Y.) 555; Hills v. Barnes, 11 N. H. 395; Simpson v. Stackhouse, 9 Pa. St. 186; Bishop v. Chanbree, M. & M. 116, 3 C. & P. 55; Henman v. Dickinson, 5 Bing. 183; Knight v. Clements, 3 N. & P. 375, 8 Ad. & E. 215; Clifford v. Parker, 3 M. & G. 909. "If the interlineations be made by a stranger and the original legacy be

§ 268. Presumptions as to time when alterations were made.—Unattested alterations in a will, though proved to have been made by the testator, in the absence of any evidence showing when they were made, will be presumed to have been made *after execution*,¹ and consequently, *unless properly attested*, will not operate as a partial revocation of the will.² Evidence of any relevant fact or circumstance may be received to show

known it will have no legal effect, and the original legacy will still be recoverable and ought to be proved as it originally stood. If made by the legatee at most in *odium spoliatoris*, it will only avoid the legacy so altered, but it cannot destroy other bequests, either to the legatee himself or to others. This is not like the case of a contract where the alteration of a security by the obligee himself avoids it. The legatees all take by the bounty of the testator; the object is to carry his will into effect, and not merely to attend to the merits or demerits of those who claim under it." By Story, J., in 1812, in *Smith v. Fenner*, 1 Gall. C. C. 170; *Doane v. Hadlock*, 42 Me. 72, 76. In the recent case of *Margary v. Robinson*, L. R. (1886), Prob. D. 8, 13, where the will was written on a small card, and the witnesses, learning of the large amount of property which had been disposed of, and fearing to be involved in a litigation, procured the will and erased their signatures, the court held that the erasure must be disregarded as a mere spoliation.

¹ *Ante*, § 229.

² *Toebbe v. Williams*, 80 Ky. 661, 665; *Camp v. Shaw*, 52 Ill. App. 241, 249; *Wright v. Wright*, 5 Ind. 389; *In re Wood's Will*, 11 N. Y. Supp. 157; *In re Lang's Will*, 30 N. Y. Supp. 388, 393, 9 Misc. R. 521; *Wetmore v. Carryl*, 5 Redf. (N. Y.) 544; *Dyer v. Erving*, 2 Dem. Sur. 160; *Malin v. Malin*, 1 Wend. (N. Y., 1828), 625; *Jackson v. Malin*, 15 Johns. (N. Y., 1818), 293; *Wheeler v. Bont*, 7 Pick.

(Mass.) 61; *Van Buren v. Cockburn*, 14 Barb. (N. Y., 1851), 118; *Crossman v. Crossman*, 95 N. Y. 145, 5 Civ. P. R. 204; *Wilcox's Will*, 20 N. Y. S. 131; *Carver's Estate*, 3 Misc. R. (N. Y.) 567. *Cf. Potter's Will*, 12 N. Y. Supp. 105; *In re Voorhees*, 6 Dem. Sur. 162; *Williams v. Ashton*, 1 Jo. & H. 115; *Simmons v. Rudall*, 1 Sim. (1851), (N. S.) 115, 137; *In re James*, 1 Sw. & Tr. 238; *Maule v. Maule*, 62 L. T. 702; *Cooper v. Bockett*, 6 T. R. 671, 4 Moore, P. C. C. 419, 449; *Burgoyne v. Showler*, 1 Robert. 5, 8, 15 Jurist, 814, 816; *In re White*, 80 L. J. Prob. 55; *Doe d. Shallcross v. Palmer*, 16 Q. B. 747, 755, 15 Jur. 836; *In re Thompson*, 3 Notes Cases, 441; *Greville v. Tylee*, 7 Moo. P. C. 320; *In the Goods of Ibbotson*, 2 Curt. 337, 338; *In the Goods of Beavan*, 2 Curt. 369; *Larkins v. Larkins*, 3 Bos. & P. 16; *Short v. Smith*, 4 East, 419; *Wood v. Wood*, 1 Phillimore, 357. So alterations made in a will to which a codicil is attached, but which are not mentioned in the codicil, will be presumed to have been made *subsequently* to the execution of the codicil, and will not be admitted to probate. *Lushington v. Onslow*, 6 Notes Cases, 183, 12 Jur. 465; *Rowley v. Merlin*, 8 Jurist (N. S.), 1165. On the rule of the text compare *ante*, § 229. But if the alterations in the will are proved to have been inserted *before* the execution of the codicil, they will be validated and republished by the latter, and must be admitted to probate. *Tyler v. Merch. Tailors' Co.*, L. R. 15 P. D. 216.

the actual date of the alteration or cancellation,¹ including the declarations of the testator, which are proved to have been *made at the time of the execution of the will, or shortly prior thereto*, indicating an intention to benefit a person, which will not be effective unless the alterations are admitted to probate as a part of the will.² But the statements of the testator, uttered subsequently to the date of the execution of the will, are inadmissible to show the date of an alteration.³

Thus, the draft of the will itself, the oral or written instructions given by the testator to the person who drew the will, and any statements made before execution that he meant to give a legacy to a person in whose favor the alteration appears to have been made, are admitted to show the date of the alteration. The testimony of an expert in handwriting, giving an opinion based upon an inspection of the will alleged to have been altered, and from a comparison of hands, is admissible, but is of little value as against the testimony of a subscribing witness, or of the draughtsman, or perhaps as against a draft of the will itself.⁴

A declaration made by the testator *before* the execution of a codicil which republishes a will may be received to show that the alteration in the will (which will was expressly referred to by its date in the codicil) was made before the execution of the codicil.⁵ A date affixed to an alteration in a will is never conclusive proof of the actual date of the alteration. And

¹ *Keigwin v. Keigwin*, 3 Curteis, 607, 611, 7 Jur. 840; *In re Treeby*, L. R. 3 P. & D. 242, 243. The will itself may be inspected. The facts that the alterations are not noted in the attestation clause; that they are in a different handwriting from that of the will; that they are apparently written with a different ink (*In re Cadge*, L. R. 1 P. & M. 543) or in pencil; that they are less carefully written, or are abbreviated and somewhat illegible, may all indicate that the alterations were made *after the will was executed*.

² *Shallcross v. Palmer*, 16 Q. B. 747, 757, 15 Jur. 814, 836, 20 L. J. Q. B. 367; *Dench v. Dench*, L. R. 2 P. D.

60, 64; *In re Hardy*, 30 L. J. Prob. 142; *In re Sykes*, L. R. 3 P. & D. 26, 28; 5 Moak's Eng. R. 521; 1 Williams, Ex'rs, § 411.

³ *Shallcross v. Palmer*, *supra*; *In the Goods of Adamson*, L. R. 3 P. & D. 253.

⁴ *In re Hindmarch*, L. R. 1 P. & D. 307; *Dubois v. Baker*, 30 N. Y. 335, 40 Barb. 556. The question to the subscribing witness: "Did you see this alteration at the time that you attested the will?" is relevant and should always be asked. *Charles v. Huber*, 78 Pa. St. 448.

⁵ *In the Goods of Sykes*, L. R. 3 P. & D. 26, 28; *ante*, § 256.

though a *prima facie* presumption that writings are made on the day of their date is recognized, wills may so far constitute an exception to this rule as to require or permit the date of an alteration to be shown by extrinsic evidence, though in making it the testator may have attached a date to it.¹

Interlineations and alterations which appear upon the will and which are without date, but which are necessary to complete its sense, may, from *their office and character*, be presumed to have been made before execution, where nothing appears to indicate the contrary.

It is a presumption of law that where an instrument is drawn with blanks in it, which are to be filled in, the blanks have been filled *before execution*. This presumption is invoked in the case of a will in which spaces are left open for the insertion of the names of legatees or the amounts of legacies.² And where some blanks in a will were filled in with black ink and others with red ink, the court determined, in the absence of all evidence as to the date of the filling of the spaces, that the names in black ink were inserted *before* and those in red ink *after* the execution of the will.³ Where a holographic will contained material alterations, the date of which could not be obtained, and the will was executed while the testator was in active service as a soldier, the alterations were presumed to have been made while the testator *was in active service*, and the will was probated⁴ as a will of a soldier in actual military service.⁵ The *prima facie* presumption is that pencil alterations are *deliberative* and that those in ink are final. When they are both in the same will, both presumptions are strengthened. For may we not assume that if the testator had made up his mind he would have used ink altogether?⁶

§ 269. The revival of wills which have been revoked.—
Where a person executes a valid will and subsequently executes

¹ In the Goods of Adamson, L. R. 3 P. & D. 258.

² 1 Jarman on Wills, ch. VII, sec. 11.

³ Birch v. Birch, 6 Notes Cases, 581, 1 Rob. 673.

⁴ Under 1 Vict., c. 26, § 11.

⁵ In the Goods of Tweedale, L. R. 3 P. & D. 204, 206.

⁶ Hawkes v. Hawkes, 1 Hagg. 321, 324; Edwards v. Astley, 1 Hagg. 490, 495; Ravenscroft v. Hunter, 2 Hagg. 68, 71; Parkin v. Bainbridge, 3 Phill. 321, 322; In the Goods of Adams, L. R. 2 P. & D. 367, 368. See, as to wills in pencil, *ante*, § 188.

another will expressly or by implication revoking it, but leaving the first will entire and undestroyed, and subsequently revokes the second revoking will without expressly republishing the first, the question may be raised, has the revocation of the second will operated to revive the first will? In England, independently of statute, the earliest will which had been revoked, but which had never been actually destroyed, was presumed to have been revived by the destruction or revocation of the revoking will, even though it had never been republished.¹

A distinction was sometimes made between the revival of a will which had been revoked by the inconsistent disposition contained in a will subsequently executed, and a will which had been expressly revoked by a clause of revocation in a subsequent will. In the former case, as the revocation of the earlier will depended upon the carrying out of the provisions of the later will, which remained revocable during the life of the testator, it may be reasonable to presume that an alteration of intention, as to the later will, may imply a revival of the former. But as a clause of express revocation is not only an expression of an intention to revoke, but an actual revocation by which all former wills are wiped out, without regard to future or other testamentary dispositions, revival may not be so readily implied, for the deceased may have desired to die intestate.²

But other cases deny the existence of any distinction between wills which do, and those which do not, contain express clauses of revocation, so far as the revival of undestroyed prior wills is concerned.³ The rule of the common law created this presumption of the revival of a revoked will in the absence of any evidence that the testator desired his earlier will to remain revoked. But the presumption of revival being founded on a presumption of an intention to die testate, which was inferred from the silence of the testator, might be rebutted by proof of a contrary intention. Thus, if the instrument which revoked the *second will* disposed of the estate of the testator

¹ *Rainer v. Rainer*, 1 Jur. 754; *Harwood v. Goodright*, Cowp. 87; *Goodright v. Glazier*, 4 Burr. 2512; 4 Kent, Com. 516.

² *Colvin v. Warford*, 20 Md. 357, 387, 391; *Powell on Devises*, 527, 528. Cf. *ante*, § 260.

³ 1 Jarman, 136.

in a manner which was wholly inconsistent with the provisions of the *first will* which the second will had revoked, there was *no revival of the first will*. And the English ecclesiastical courts, which had the exclusive jurisdiction of the probate of wills disposing of personal property, never permitted a legal presumption of a revival of a prior undestroyed will to be drawn from the revocation of a subsequent will which revoked it. In those tribunals the question of revival was always one of fact. The intention was not to be implied from the mere act of destroying a later will, but was to be determined according to all the facts and circumstances of each case.¹ In the United States, in the absence of statute, the cases, while not harmonious, undoubtedly tend to establish the rule of the English ecclesiastical courts that no presumption of the revival of a revoked will is to be recognized merely on account of the destruction of the revoking will² and the continued existence of the will which has been revoked. The revoked will, though it may still exist, is not revived unless the testator shall republish it (which he may do by a properly attested codicil referring to it), or in a case where the second will is revoked by a testamentary writing, unless the latter will shall show an intention to revive the earliest revoked will.³

¹ *Usticke v. Bawden* (1824), 2 Add. Mo. 28; *Bohannon v. Walcott*, 1 How. 116, 125, 2 Ecc. R. 244; *Moore v. Moore*, 1 Phillimore, 410, 412, 1 Ecc. R. 123; *Wilson v. Wilson*, 3 Phill. 543, 555; *Hooton v. Head*, 3 id. 26; *Kirkcudbright v. Kirkcudbright*, 1 Hagg. 325; *Welch v. Phillips*, 1 Moo. P. C. 299; 1 *Powell on Devises*, 523.

² See note, 7 L. R. A. 485.

³ In *re Loines*, 108 Cal. 688, 690, 41 Pac. R. 771; *Peck's Appeal*, 50 Conn. 563; *James v. Marvin*, 3 Conn. (1821), 576, 578; *Harwell v. Lively* (1860), 29 Ga. 509, 30 Ga. 315, 320; *Sawyer v. Sawyer*, 7 Jones' L. (52 N. C., 1859), 134, 139; *Barksdale v. Hopkins*, 23 Ga. 332, 340; *Colvin v. Warford* (1863), 20 Md. 357, 391; *Scott v. Fink*, 45 Mich. 241; *Stevens v. Hope* (1883), 52 Mich. 66, 70; In *re Stickney*, 53 N. Y. S. 929; *Beaumont v. Keim* (1872), 50

Mo. 28; *Bohannon v. Walcott*, 1 How. (Miss., 1836), 336, 340; *Pickens v. Davis*, 134 Mass. 254-257; *Marsh v. Marsh*, 3 Jones' L. (48 N. C., 1855), 77; *McClure v. McClure*, 2 Pickle (86 Tenn.), 173, 179, 6 S. W. R. 44; *Cheever v. North* (Mich.), 64 N. W. R. 455; *Lawson v. Morrison*, 2 Dall. (U. S.) 286, 290; *Boudinot v. Bradford*, 2 Yeates (Pa., 1797), 170, 174, 2 Dall. (Pa.) 265. *Contra*, *Taylor v. Taylor*, 2 Nott & McC. (S. C., 1820), 482, 485. "As wills are ambulatory, and have no operation until the death of the testator, it is difficult to see how the execution of a second will which is afterwards destroyed by the testator can in any wise affect the validity of a will previously executed. Both are inactive during the life of the testator, and the cancellation of

the second, it would seem, must necessarily leave the first to go into operation at the testator's death. Nor is it perceived how the fact that the second contained a clause of revocation can alter the case; because that clause is just as inactive and inoperative as the rest of it, and so continues up to the time that the whole is canceled. This principle is settled in the common-law courts of England in regard to devises. But

in the ecclesiastical courts in regard to wills of personalty, the principle is modified to some extent, and the validity of the first will is made to depend upon the question of intention, which, however, may be established by parol evidence of declarations and other circumstances tending to show an intention to restore the first will." By Pearson, J., in *Marsh v. Marsh*, 8 Jones' L. (N. C.), 77, 78.

CHAPTER XI.

THE ESTABLISHMENT AND PROBATE OF LOST WILLS.

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| <p>§ 270. The jurisdiction of equity to establish lost wills.</p> <p>271. The extent and character of the search for the lost will which must be shown.</p> <p>272. The presumption of the loss or destruction of a will from its non-discovery among the papers of the testator.</p> <p>273. Necessary parties to a suit to establish a lost will.</p> | <p>§ 274. The competency and the range of the evidence — When the declarations of the testator are received.</p> <p>275. The burden of proof and degree of evidence required.</p> <p>276. The sufficiency of the testimony of a single witness.</p> <p>277. The declarations of the testator as evidence.</p> <p>278. An independent portion of a will may be established.</p> |
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§ 270. **The jurisdiction of equity to establish lost wills.**—The English courts of equity, as early as the latter part of the seventeenth century, entertained cases to establish lost wills. Long prior to this they had exercised jurisdiction to establish lost instruments in writing, or to procure the production of those which had been suppressed. This jurisdiction was ordinarily exercised only *after the party claiming under the missing instrument had failed to obtain adequate redress at law*, on account of his inability to produce the writing on which he relied. But it was soon decided, and it is now the rule, that a prior failure on the part of the applicant to obtain a remedy at law is not indispensable to the initiation of a suit in equity to establish the missing instrument. If he has in contemplation any proceeding in which he may have occasion to employ the lost will as evidence, he may bring his bill in chancery to have it established. As early as the year 1687, we find instances of lost wills and lost deeds which were proved by parol in equity, and there were doubtless other cases prior to that time which have not been reported.¹

¹ Dalston v. Coatsworth, 1 P. Wms. 730, 732; Cowper v. Cowper (1734), 2 P. Wms. 721, 748; Sanson v. Rumsey (1706), 2 Vern. 561; Hunt v. Matthews, 1 Vern. 408; Tucker v. Phipps (1746), 3 Atk. 360; Swinburne, 2 s. pt. 14, pl. 4.

A decree of the chancellor was usually to the effect that the petitioner had proved the execution of the lost will, setting out also its contents as proved. The executor of the will, if it disposed of personal property, was then under the necessity of having it probated in the ecclesiastical courts. Subsequently, because of the roundabout character of these proceedings, the ecclesiastical courts themselves entertained applications to establish lost wills disposing of personal property, and thus acquired a jurisdiction which was concurrent with equity.¹ The principles which are applicable to the proof of a lost will do not differ in any material respect from those which are applicable in the case of any lost instrument.² In the United States the subject is largely regulated by statutes, which prescribe in detail in what courts the proceedings may be brought, who are proper and necessary parties, and the mode and degree of proof required. Proceedings under these statutes are generally regarded as equitable, and the court has full power to mould its decree to suit the particular exigencies of the case.³ And a statute which provides that probate courts shall have *exclusive* jurisdiction of the estate of a decedent, and that no will shall be valid until allowed in a probate court, has been held to divest the court of chancery of its jurisdiction to establish lost wills.⁴

¹ *Martin v. Laking*, 1 Hagg. 244, 246; *Lillie v. Lillie*, 8 Hagg. 185.

² *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154, 176, 239; *Brown v. Brown*, 8 El. & B. 876, 886, 27 L. J. Q. B. 173; *McNeely v. Pearson* (Tenn., 1898), 42 S. W. R. 165.

³ *Bowen v. Idley*, 6 Paige (N. Y., 1836), 46; *Everitt v. Everitt*, 41 Barb. (N. Y.) 385, 392; *Brown v. Brown*, 10 Yerg. (18 Tenn., 1836), 84, 89; *Buchanan v. Matlock*, 8 Humph. (27 Tenn.) 890, 897; *Hall v. Allen*, 81 Wis. 691, 694; *In re Valentine*, 98 Wis. 45, 51; *Harris v. Harris*, 10 Wash. 585, 39 Pac. R. 148. Though a court of equity has jurisdiction to establish a lost will, it has no jurisdiction to admit it to probate. For this purpose application must be made to the probate court. *McDaniel v. Pattison*,

98 Cal. 86, 32 Pac. R. 805. As an action to establish a lost will is equitable, a jury trial cannot be demanded as of right. *Wright v. Fultz* (Ind. Sup.) 88 N. E. R. 175.

⁴ *McCormick v. Jernigan*, 110 N. C. 406, 14 S. E. Rep. 971. New York Code Civ. Pro., §§ 1861 and 1865, confers jurisdiction on the supreme court, and provides that the plaintiff shall not be entitled to a judgment establishing the will, unless he shall prove that it was in existence at the testator's death, or was fraudulently destroyed prior thereto; and shall clearly and distinctly prove its contents by at least two credible witnesses, or by one such witness and a correct copy or draft. Where it is alleged that the will was destroyed during the life-time of the testator,

§ 271. **The extent and character of the search for the lost will which must be shown.**—The party who endeavors to establish a lost will has the burden of proof, and is met with the presumption of a revocation, which he must overcome.¹ The force of the presumption of a revocation, where the will is shown to have been executed, and it was last seen in the possession of the testator, varies with the circumstances of each case. It is never conclusive, and he who has to prove the existence of the will unrevoked may do so either by circumstantial or direct evidence. He may prove that the will was seen intact and unrevoked *after* the death of the testator. He may prove, where it cannot be found after the death of the testator, that it was fraudulently destroyed during his life, or that he destroyed it while mentally irresponsible or inadvertently, and without an intention to revoke.

When it is possible, the actual destruction of the will should be proved. If this cannot be done, it is incumbent upon the party alleging the loss to show that a careful, diligent and *bona fide* search for the instrument has been made, and that the search has been unsuccessful. It must appear that the search was made in those places where the will was most likely to have been deposited or secreted by the testator. When the will was last seen in his possession, it would be proper to look among papers kept by him in his desk or safe, or other receptacle for that purpose. The length and diligence of the search depend upon the circumstances of the case. Thus, a lengthy and thorough search would not be required where there was *some evidence that the will had been destroyed by a third person*,² or by the testator inadvertently without an intention to revoke it.³

actual fraud in its destruction must be shown. In *re De Groot's Will*, 9 N. Y. Supp. 471, 18 Civ. Pro. R. 102, following *Timon v. Claffy*, 45 Barb. 438. See also *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. R. 110.

¹ *Post*, § 272.

² *Jones v. Casler* (Ind.), 88 N. E. R. 812.

³ *McConnell v. Wildes*, 153 Mass. 487, 489; *Minkler v. Minkler*, 14 Vt. (1842), 125, 127. As to the extent of

the search, see *Patterson v. Winn*, 5 Pet. (30 U. S., 1831), 240; *Glassell v. Mason*, 32 Ala. 719; *Kelsey v. Hammer*, 18 Conn. (1847), 311; *Bruns v. Close*, 9 Colo. 225; *Bigelow v. Summers*, 28 Fla. (1891), 759; *Black v. Miland*, 87 Ga. 573; *Lynn v. Morse*, 76 Iowa, 665; *McConnell v. Wildes*, 153 Mass. 487, 489; *Page v. Page*, 15 Pick. (Mass.) 368; *Bingham v. Hyland*, 6 N. Y. Supp. 75; *Chamberlain v. Gorham*, 20 Johns. (N. Y.) 144;

§ 272. The presumption of the loss or destruction of a will from its non-discovery among papers of the testator.—The fact that a will which is proved to have been properly executed by the testator, and which was last seen in his custody, cannot be found at his death, raises a presumption that it was destroyed by him with the intention of revoking it.¹ Some authorities pronounce this presumption of revocation to be a presumption of law. Others, with equal certainty, declare it to be a presumption of fact. The difference is not material, if, in any case, the presumption is rebutted by satisfactory evidence that the testator has not revoked his will.

§ 273. Necessary parties to a suit to establish a lost will. All persons whose interest will *in any manner* be affected,

Woodworth v. Barker, 1 Hill (N. Y.), 176; Bachelder v. Nutting, 16 N. H. 311; Shirley v. Deey, 17 Ohio (1848), 156; Overland v. Menczer, 83 Tex. 122; Jameson v. Snyder, 79 Wis. 286, 48 N. W. R. 261; Riggs v. Taylor, 9 Wheat. (24 U. S., 1824), 496; Henry v. Devinney, 101 Mo. 378; Foot v. Silliman, 77 Tex. 268. The fact that a will when last seen was in the custody of a person whose interests were adverse to its existence may, in connection with other facts, raise the inference that he destroyed it. Jones v. Murphy, 8 Watts & S. (Pa.) 299. But the fact that a person who would gain by the loss or destruction of a will had an opportunity to make away with it while it remained under the control of the testator is not sufficient. Knapp v. Knapp, 10 N. Y. 276, 280.

¹ McBeth v. McBeth, 11 Ala. (1847), 596; Smith's Will, 3 Houst. (Del.) 335; Mercer v. Mercer, 14 Bush (77 Ky.), 434, 438, 447; Cologan v. Burns, 57 Me. 449, 455; Betts v. Jackson, 6 Wend. (N. Y.) 173; Idley v. Bowen, 11 Wend. 227, 233; Holland v. Ferris, 2 Bradf. (N. Y.) 334; Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. R. 209; Southworth v. Adams, 11 Biss. C. C. (1882), 256, 263; Legare v. Ash, 1 Bay

(S. C., 1795), 457, 464; Brown v. Brown, 10 Yerg. (Tenn.) 84, 89; Appling v. Eades, 1 Gratt. (Va.) 292; Minkler v. Minkler, 14 Vt. 125, 127; In re Valentine, 98 Wis. 49, 55; Sugden v. Lord St. Leonards, L. R. 1 P. D. 154, 217, 17 Moak's Eng. R. 511, 523; Welch v. Phillips, 1 Moo. P. C. 299; Cutts v. Gilbert, 9 Moo. P. C. 181; Loxley v. Jackson, 3 Phil. 126; Brown v. Brown, 8 EL. & B. 376, 384, 386; Colvin v. Fraser, 2 Hagg. 266, 325, 4 Ecc. R. 113. The presumption of revocation which arises from proof that the will was last seen in the testator's possession, and that it was not found among his papers after his death, is conclusively rebutted by proof that he had deposited it with another person and had no access to it afterwards. Schultz v. Schultz, 35 N. Y. 653; Colvin v. Fraser, 2 Hagg. 277. See *ante*, § 261, as to disappearance of duplicate wills. A will which is lost or destroyed with the knowledge of the testator during his life-time will be presumed to be revoked, though the testator subsequently declared his intention *not* to make another will. Appeal of Deaves, 21 Atl. R. 395, 140 Pa. St. 242, 27 W. N. C. 483. Cf. *ante*, §§ 257, 261.

either favorably or adversely, or whose interests are involved, are proper and necessary parties in an action to establish a lost will. Such usually are legatees and devisees under the will, the heirs and next of kin of the testator, his widow, the executor, and the trustee of any trust which is created by the will.¹ All persons who are made parties to the action to prove the lost will, *though interested*, are not thereby disqualified from testifying because of interest, though they may, by a statute, be precluded from testifying to any communications or transactions by or with the deceased person in an action by or against his representative.²

§ 274. **The competency and range of the evidence — When the declarations of the testator are received.**— The facts essential to be proved in an action to establish a missing will are, *first*, that the will was executed in the statutory mode; *second*, that it has not been revoked by the testator; and *third*, the contents of the will.³ If the subscribing witnesses to the lost will are living, and are within the jurisdiction of the court, they must be produced and examined as in other cases in order to prove execution.⁴ If they are dead, or if their presence cannot, for any valid reason, be procured, the execution of the will may be proved by substitutionary evidence.⁵ If on being produced they are hostile, or their recollection is at fault, the same rule applies to proving execution as in cases where the will is not lost.⁶

The admissibility of the declarations of the testator subsequent to the date of the execution of the will is much discussed by the cases, which, both English and American, are in irreconcilable contradiction on this point. It is admitted by all the cases that, where the will is proved to have been executed, and where it was last seen in the possession of the testator, but

¹ *Hawes v. Bragdon*, 66 Me. 534, 535; *Southworth v. Adams*, 11 Biss. C. C. 260; *In re Valentine*, 93 Wis. 45, 51.

² *In re Valentine*, 93 Wis. 45, 51. See also *ante*, §§ 205, 214.

³ The existence of the will unrevoked at the death of the testator is usually to be proved by affirmative evidence that it was *subsequently*

destroyed. *Jones v. Casler*, 139 Ind. 382, 88 N. E. R. 812. And in New York it is sufficient to prove, in some cases, that the will had been destroyed fraudulently during the lifetime of the testator.

⁴ *Ante*, § 210.

⁵ See *ante*, § 210.

⁶ See §§ 211-213.

cannot be found at his death, or is found mutilated, his declarations accompanying an act of destruction or cancellation are admissible to show with what intent the act was done. But his declarations to the effect that he has or has not made a will, uttered subsequently to the act of execution or destruction, stand on a different footing. The statute, which requires that the execution of the will shall be proved by the testimony of subscribing witnesses or other competent evidence, is applicable to lost or destroyed wills as well as to those which are producible at the probate. Hence, ordinarily, the *fact of the execution of a will* which is lost cannot be proved by showing that the testator, subsequently to the date upon which it is alleged to have been executed, asserted that he had made such will.¹ In an action to establish a destroyed will, it is enough to prove the substance thereof, without proving the precise language employed.² Though the production of a draft of the lost will may be more satisfactory as proof of its contents than evidence which is wholly oral, it is not indispensable. There are no degrees of secondary evidence, and the draft is upon the same footing in relation to the will as oral proof. The

¹ *Kitchens v. Kitchens*, 39 Ga. 168; *Mercer v. Mackin*, 14 Bush (Ky.), 434, 438, 439; *Chisolm's Will*, 7 B. Mon. (Ky.) 408; *In re Ripley*, 4 Jur. (N. S.) 342, 1 Sw. & Tr. 68; *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154, 227, 17 Moak's Eng. R. 511; *Doe d. Shallcross v. Palmer*, 16 Q. B. 747, 15 Jur. 836, 840. *Contra*, *McBeth v. McBeth*, 11 Ala. 596; *Whiteley v. King*, 10 Jur. 1079. "The exercise of the testamentary power being conditional on the observance of statutory formalities, a man cannot by his mere assertion establish that he has fulfilled the condition necessary to the exercise of the right." *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154, 227. The execution of a lost instrument, whether a will or a writing *inter vivos*, must always be proved. *Johnson v. Railroad Co.*, 90 Ala. (1889), 505; *Kelsey v. Hammer*, 18 Conn. (1874), 811; *Porter v. Ferguson*, 4 Fla. (1851), 102; *Gillis v. Wilm. R. R. Co.* (N. C.,

1891), 13 S. E. R. 11; *Gorgas v. Hertz*, 150 Pa. St. 538. "Experience tells us that few kinds of talk are more unreliable than talk about wills. Not only are expressions of intention, when uttered (and ordinarily the very fact of their utterance is a presumption against them), uttered with a consciousness that they may be at any time recalled, but it is a very common maxim that people who talk about their wills very rarely make wills in conformity with their talk. Nor are we to forget, in considering this question, the character of the medium through which these declarations pass. The testator's lips are sealed in death, and evidence of his intention, thus reproduced, comes to us without that sanction which is given when there is power of explanation in the person whose remarks are reported." *Wharton's Ev.*, § 992.

² *Jones v. Casler*, 139 Ind. 382, 38 N. E. R. 812.

draft may be a little more definite, and hence more valuable than oral proof, and its absence may have the effect of causing the court to scrutinize the oral evidence with caution.¹

§ 275. **The burden of proof and degree of evidence required.**—The burden of proof to establish the execution and contents of the lost will is upon the party who claims under it.² The petitioner is usually required to prove the execution and the contents of the lost will by evidence which shall be strong, cogent and convincing. It is sometimes said that the evidence must be clear, full and satisfactory, though he is never required to produce evidence sufficient to remove all reasonable doubt from the mind of the court.³ In the absence of statute requiring proof by the testimony of two credible witnesses, the execution of the will and its contents may be proved by the evidence of one witness, if that is satisfactory and convincing. The most conclusive proof of the loss of the will in question is evidence of the fact that it was actually destroyed *without* the knowledge and consent of the testator. But evidence of this sort is usually not attainable. Ordinarily, if the petitioner shall prove the due and proper execution of the will by the subscribing witnesses, or by proper substitutionary evidence if they cannot be found, and shall also prove that when the will was last seen it was not in the possession of the testator, or that after a diligent search it cannot be found, he may

¹ It may be well in this place to call the attention of the reader to the practice followed by every careful draughtsman, of retaining and preserving either the draft or a copy of every will drawn. Such a paper, containing, as it usually does, the exact language of the testator, may prove of inestimable value as evidence of the execution and contents of a will that has been lost or accidentally destroyed.

² *Johnson's Will*, 40 Conn. 587, 589; *Ford v. Teagle*, 62 Ind. 61, 63; *Rich v. Gilkey*, 78 Me. 595; *Davis v. Sigourney*, 8 Met. (Mass.) 487; *Newell v. Homer*, 120 Mass. 277, 281; *Durfee v. Durfee*, 8 Met. (Mass.) 487; *Grant v. Grant*, 1 Sandf. Ch. (N. Y.) 235; *Kahn v. Hoes*, 35 N. Y. Supp. 273, 14

Misc. R. 63; *Keery v. Dimon*, 37 N. Y. Supp. 92, 91 Hun, 642; *Perry v. Perry*, 21 N. Y. Supp. 183, 66 Hun, 629; *Fetes v. Volmer*, 58 Hun, 1, 11 N. Y. Supp. 552; *Jackson v. Russell*, 4 Wend. (N. Y.) 543; *McKenna v. McMichael* (Pa., 1899), 42 Atl. R. 14; *Idley v. Bowen*, 11 Wend. (N. Y.) 227, 229; *Reeves v. Booth*, 2 Mills (S. C.), 334; *Apperson v. Dowdy*, 82 Va. 776; *Southworth v. Adams*, 11 Biss. C. C. 256, 260; *McNeely v. Pearson* (Tenn., 1899), 42 S. W. R. 165; *Huble v. Clark*, 1 Hagg. 115, 118-128; *Lillie v. Lillie*, 3 Hagg. 184; *Davis v. Davis*, 2 Add. 226; *Colvin v. Fraser*, 2 Hagg. 325; *Wharram v. Wharram*, 3 Sw. & T. 301, 33 L. J. P. (M. & A.) 75.

³ See cases cited in last note.

rest, having satisfactorily sustained the burden of proof. It is not for him to show that any particular person destroyed it, or that it has been destroyed in a particular manner. The burden of proof is then on those who claim that it has been revoked to show that the testator destroyed it *animo revocandi*.¹

§ 276. **The sufficiency of the testimony of a single witness.**—It is well settled that, in the absence of statute prescribing a different mode or requiring a higher degree of proof, a lost will may be established by the testimony of a single witness showing its execution and contents,² though he claims under it and had himself destroyed it under a mistaken impression as to its nature.³ And this is the rule where subscribing witnesses cannot be produced, though the statute requires the evidence of two such witnesses at the probate.⁴

If the witness is able to refresh his memory by consulting a draft of the will or a duplicate which he, acting as the draughtsman, made at or prior to the time of the execution, his evidence ought to suffice, if he is disinterested and without motive to prevaricate. But where a witness, though without bias and otherwise credible, takes the stand for the purpose of testifying orally to the contents of a lost will, the court ought to be well satisfied, from the circumstances, that his recollection is trustworthy, particularly if the will is lengthy and complicated. Courts ought to act cautiously and not upon mere probabilities.⁵ In those states where a lost will must, by stat-

¹ *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. R. 719; *In re Gardner's Estate*, 30 Atl. R. 300, 164 Pa. St. 420, 35 W. N. C. 417; *In re Soule's Will*, 15 N. Y. S. 984, 61 Hun, 624. In the case of *Ruser's Will*, 6 Dem. Sur. (N. Y.) 31, it was held that a lost will cannot be admitted to probate upon a stipulation of Counsel as to its valid execution and contents. To permit this would be to allow the attorneys of the contending parties to make a will for the deceased after his power to do so had been terminated by death.

² 1 *Redfield on Wills*, p. 349; *Dickey v. Malechi*, 6 Mo. 177, 184; *O'Fallon v. Mullanphy*, 4 Mo. 601.

³ *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401.

⁴ *Skaggs v. Horton*, 83 Ala. 352, 2 S. R. 110.

⁵ *Johnson's Will*, 40 Conn. (1873), 587, 589; *Davis v. Sigourney*, 8 Met. (Mass.) 486. Where the only evidence of the execution and the contents of the will was the deposition of a witness, who is eighty-five years of age, to the effect that sixty-eight years before she had read the will, and that she remembered its provisions, which she then stated at length, the court held that, though such testimony was undoubtedly admissible as a matter of law, it was very weak and unreliable, and by no means suf-

ute, be clearly and distinctly proved by the testimony of *two* credible witnesses, the will, as an entirety, must be established by the evidence of two witnesses, and each of them must be able to testify to every dispositive part of it.¹

§ 277. **The declarations of the testator as evidence.**—If the valid execution of a will is shown, either by the attesting witnesses, or competent substitutionary evidence in case their testimony is unobtainable, and the will appears to have been last seen in the possession of the testator, his declarations tending to show that he has or has not destroyed it, or which show it was in existence at his death, are received to strengthen or to rebut the presumption of revocation which arises from its disappearance.²

On the other hand, the rule is that *the contents of the lost will* cannot be proved exclusively by the statements of the testator as to the names of the beneficiaries, or the property disposed of, whether they were made prior or subsequent to execution.³ If, however, a valid execution is proved, and there is *some* evidence of the contents of the will, the prior and subsequent declarations of the testator are competent as supplementary proof of the contents of the missing will.⁴

ficient alone to establish the will. *Apperson v. Dowdy*, 82 Va. 776 (1886), 1 S. E. R. 105.

¹ *Todd v. Rennick*, 13 Colo. 548, 22 Pac. R. 898; *Jones v. Casler* (Ind.), 38 N. E. R. 812; *In re De Groot's Will*, 18 Civ. Pro. R. 102; *In re Ruser*, 6 Dem. Sur. 31; *Harris v. Harris*, 10 Wash. St. 555, 39 Pac. R. 148.

² *McBeth v. McBeth*, 11 Ala. 596; *Noel v. Patten*, 40 Pa. St. (1861), 484; *In re Marsh's Will*, 45 Hun. 107; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. R. 886; *Tynan v. Paschal*, 27 Tex. (1864), 368; *Gardner v. Gardner* (Pa., 1897), 85 Atl. R. 558; *In re Steinke's Will*, 70 N. W. R. 61, 95 Wis. 121; *Richard v. Mumford*, 2 Phillimore, 128; *Lillie v. Lillie*, 3 Hagg. 184, 189; *Colvin v. Fraser*, 2 Hagg. 325; *Loxley v. Jordan*, 3 Phill. 128; *Whiteley v. King*, 10 Jur. (N. S.) 1079; *Patten v. Poulten*, 4 Jur. (N. S.)

841, 1 Sw. & Tr. 55; *Eskerley v. Platt*, L. R. 1 P. & D. 281, 284.

³ *Meroer v. Mackin*, 14 Bush (Ky.), 434, 438; *Clark v. Turner* (Neb., 1897), 69 N. W. R. 843. The testimony of a witness who has never inspected the lost will, but had merely heard the testator read it, is only evidence of the testator's declarations, and is, for that reason, inadmissible. *Clark v. Turner* (Neb., 1897), 69 N. W. R. 843. Where, in a case of contested probate, there is some evidence that the testator made a later will which the beneficiary of the earlier will concealed or destroyed, evidence of the declarations of the testator is competent to show the contents of the later will. *In re Lambie's Estate*, 56 N. W. R. 228, 97 Mich. 49.

⁴ *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154, 225, 241, overruling *Quick v. Quick*, 3 S. & T. 442; *John-*

§ 278. **An independent portion of a will may be established, though all be not proved.**—The cases are not harmonious as to the question whether complete proof of all the contents of the will shall be required. If the statute permitting or regulating the proof of lost wills requires the whole will to be established before it can be admitted to probate, proof of a portion will not suffice.¹ But, in the absence of such a requirement, it seems, according to the majority of the cases, that any substantial provision of a lost will, which is complete in itself and independent of the others, may, when proved, be admitted to probate, *though other provisions cannot be proved*, if the validity and operation of the part which is proved are not affected by those parts which cannot be proved. This view seems to be consistent with reason and common sense. Accordingly a clause of revocation in a missing will may be probated, though proof of any or every disposing part cannot be supplied.²

son v. Lyford, L. R. 1 P. & D. 546; Thynne v. Stanhope, 1 Add. 52, 22 Eng. Ecc. 23; Doe v. Perkes, 3 B. & A. 489; In Goods of Doane, Spinks, 106; Clarke v. Scripps, 22 Eng. L. & Eq. 627; Cologan v. Burns, 57 Me. 449, 455; Smock v. Smock, 11 N. J. Eq. 157; Lawyer v. Smith, 8 Mich. (1860), 142; Lambie's Estate, 97 Mich. 49; In re Marsh's Will, 45 Hun (N. Y.), 107.

¹ *Ante*, § 275.

² Sugden v. Lord St. Leonards, L. R. 1 P. D. 154, 230, 231; Dickinson v. Stidolph, 11 Com. Bench (N. S.), 341; Davis v. Sigourney, 8 Met. (49 Mass., 1844), 487. See also Dickey v. Malechi, 6 Mo. (1835), 176, 184; Jackson v. Jackson, 4 Mo. 211; Skeggs v. Horton, 82 Ala. 352, 2 S. R. 110; Swinb., pt. 1, sec. 14, pl. 4; Williams, Ex'rs, pt. 1, bk. 4, c. 8, § 7; Idley v. Bowen, 11 Wend. (N. Y.) 227, 229; Bowen v. Idley, 1 Edw. Ch. (N. Y.) 148, 163; Jones v. Casler, 139 Ind. 382, 38 N. E. R. 812; Martin v. Laking (1827), 1 Hagg. 244, 246; Lillie v. Lillie, 3 Hagg. 185; Trevelyan v. Trevelyan, 1 Phil. 158. Though all parts of a will destroyed after the death of the testator are not recovered, the will, so far as it can be restored to its original condition, should be admitted to probate; and a copy, which during the life-time of the testator had been made by him or any other person, may be admitted to probate with it, as constituting together the will of the deceased, where the copy shows what words have been omitted from the will as restored. In Goods of Leigh (1892), Prob. 82.

CHAPTER XII.

THE INCORPORATION IN THE WILL OF EXTRINSIC WRITINGS.

§ 279. The incorporation in the will of unattached writings.	§ 282. Admission to probate of writing referred to.
280. The requisites for the incorporation of the extrinsic writing.	283. Will consisting of several unattached sheets.
281. The will must refer to the writings which are to be incorporated as in existence.	284. The probate of separate wills of property located at home and abroad.

§ 279. **The incorporation in the will of unattached writings.**—The testator may, in his will, refer to another writing not visibly attached to it, and which, upon examination, proves not to be in a form, so far as its execution is concerned, which will permit it to receive probate as a will under the statute. Thus, he may refer to a map or plan of the real property which he devises, or he may mention the deed or other instrument by which his title to property has been conveyed to him. It is then absolutely essential that the writing thus referred to by the will should be consulted to ascertain the complete intention of the testator. The testator might have inserted in his will those portions of the extrinsic writing which were material; but the fact that he has neglected to do this must not prevent the court from having recourse to it.

So, by a fiction of law, the paper referred to is said to be incorporated in the will by this reference to it. A very familiar instance of this doctrine may be found in the case of the execution of a codicil republishing an existing will, but to which it is not physically and actually attached. It is well settled, as is elsewhere explained, that the statutory execution of a codicil referring to and confirming an existing will operates as a republishing of it;¹ and where the prior will is invalid because a statutory requisite has been omitted at its execution, the codicil, by the affirmation of it, republishes the will as of

¹ *Ante*, § 216 et seq.

the date of the codicil. But the doctrine of the incorporation by reference of extrinsic papers, so far as it is here discussed, is applicable solely to prior writings which are non-testamentary in their character.

§ 280. The requisites for the incorporation of the extrinsic writing.—In order that a writing extrinsic to the will may be validly incorporated by the reference of the testator to it in the will, three facts must be shown. In the first place the testator in the will itself must refer to the writing as *being in existence* at the date of execution. *Secondly*, it must be proved (and this of course can only be done by parol evidence) that the writing was *in fact in existence* at the date of the will. *Third*, the writing which is offered for probate as a part of the will *must be identified* by the proponent as the writing which was referred to by the testator.

If these requirements are complied with, it is not material whether the writing, the incorporation of which is demanded, is in the handwriting of the testator or in that of some other person.¹

In the first place the reference to the extrinsic document must be such as will enable the court to identify it.²

§ 281. The will must refer to writings as in existence which are to be incorporated.—In order that the paper referred to shall be incorporated it must conclusively appear from the will itself that the testator, either in express language or by necessary implication, has referred to the paper as *being in existence at the date the will was executed*.³ Of course he need not *in express terms* in the will state the fact that the paper has been executed, or that it is in existence at that time.

¹ But *cf. ante*, § 220, as to holographic wills.

² *Murphy's Estate*, 104 Cal. 554, 38 Pac. R. 543; *In re Sohler*, 78 Cal. (1889), 477; *Crosby v. Mason*, 32 Conn. (1865), 482; *Fesler v. Simpson*, 58 Ind. 83; *In re Sanderson*, 62 N. Y. St. R. 227, 255; *Chamblee v. Broughton* (N. C.), 27 S. E. R. 11. "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed, whether the paper referred to

be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to, takes effect as part of the will, and should be admitted to probate as such." *Newton v. Seamen's Friend Society*, 180 Mass. 91, 93.

³ See *ante*, § 256.

Any statement in the will from which it can reasonably be inferred that the paper has been written or made prior to the execution of the will, and that it is still in existence, is sufficient.¹

A reference in a will to property left to a person by the will of her husband, mentioning the date as well as the fact that part of it had been revoked, or a reference to a deed as *dated and made*,² or to a letter of the same date as his will,³ or a reference to a trust deed or marriage settlement in accordance with the terms of which the testator is disposing of his property,⁴ or a reference to a schedule as *annexed* to the will,⁵ or to a certain entry which *is* in a ledger or other book of account kept by the testator,⁶ is a reference to a paper as being *in existence at the execution of the will*, which will incorporate it in the will.⁷

But a reference by the will to a document "*made or to be*

¹ *Vestry v. Bostwick*, 8 App. D. C. 452; *In re Sohler*, 78 Cal. 477; *Crosby v. Mason*, 82 Conn. 482; *Fesler v. Simpson*, 58 Ind. (1877), 83; *Thayer v. Wellington*, 9 Allen (91 Mass.), 283, 292; *Wilbur v. Smith*, 5 Allen (Mass., 1863), 194; *Loring v. Sumner*, 23 Pick. (Mass.) 89, 102; *Newton v. Seamen's Fr. Soc.*, 180 Mass. 91; *Harvey v. Chouteau*, 14 Mo. (1851), 587; *Brown v. Clark*, 77 N. Y. 360; *Tonnele v. Hall*, 4 N. Y. (1850), 140, 145; *Booth v. Baptist Church*, 126 N. Y. 215, 247; *Baker's Appeal*, 107 Pa. St. 381; *In re Lambert's Estate*, 10 Pa. Co. Ct. R. 10; *Wikoff's Appeal*, 15 Pa. St. 281; *Johnson v. Clarkson*, 8 Rich. Eq. (S. C.) 305; *Pollock v. Glassell*, 2 Gratt. (Va., 1846), 439; *Allen v. Boomer*, 82 Wis. 264, 370; *Ford v. Ford*, 70 Wis. 19, 46; *In the Goods of Gill*, L. R. 2 P. & D. 6; *In the Goods of Mercer*, L. R. 2 P. & D. 91; *In the Goods of Sunderland*, L. R. 1 P. & D. 198; *In re Lady Truro*, L. R. 1 P. & D. 201; *In re Reid*, 38 L. J. (P. & M.) 1; *In re Mathias*, 3 Sw. & Tr. 100; *In the Goods of Hunt*, 2 Rob. Ecc. R. 623; *In the Goods of Garnett*, L. R. Prob. (1893), 90, 96; *In the Goods of Wotton*, L. R.

3 P. & D. 159; *Durham v. Northen*, L. R. 1 P. & D. (1893), 86, 87.

² *Ogsbury v. Ogsbury*, 115 N. Y. 290 (1889), 22 N. E. R. 219; *Sheldon v. Sheldon*, 1 Rob. 81, 3 Notes Cas. 254, 8 Jur. (N. S.) 877; *Bizzey v. Flight*, L. R. 3 Ch. D. 269; *Hunt v. Evans*, 134 Ill. 496, 25 S. E. R. 579.

³ *Shillaber's Estate*, 74 Cal. 144. Where a testator refers to a writing as existing, parol evidence is always admissible to show that the writing referred to did not in fact exist; and if the court is convinced of its non-existence it cannot be admitted to probate as a part of the will. *Shillaber's Estate*, 74 Cal. (1887), 144; *Hunt v. Evans*, 134 Ill. 496 (1890), 25 S. E. R. 579.

⁴ *Goods of Dickins*, 1 Notes Cas. 398, 3 Curt. 60.

⁵ *Goods of Willesford*, 1 Notes Cas. 404.

⁶ *Quihampton v. Going*, 24 Weekly R. 917. Cf. § 246.

⁷ The instrument, whether deed or other writing referred to in the will as in existence at the date of execution so as to be incorporated with it, need never be shown to the witnesses

made,"¹ or a disposition which is to be made by the executor "as I may have heretofore or may *hereafter direct him in writing*,"² or to persons or things *hereinafter* to be named,³ or to a schedule erroneously stated to be *hereinafter* annexed,⁴ is not a reference to a paper as existing at the time of execution which incorporates it in the will. A letter which was written by the testator *after* the execution of a will, and which was found by a legatee in a trunk, the contents of which, including the sum of \$18,000 in money, had been left to the legatee to keep the principal of the sum for the child of the testator, and if the child died the legatee was to keep the money, cannot be regarded as incorporated, for the reason that it is not referred to by the will, nor was it written before the execution of the will.⁵

§ 282. Admission to probate of writing referred to.—Whether the writing referred to shall be admitted to probate and copied at length upon the records of the court is largely a matter of judicial discretion.⁶ This is the English rule, and would be the law in the United States where the matter is not regulated by statutes which require all papers referred to in the will to be probated.⁷ In England, where a document was

of the will at the time they attest its execution. In *re Willey's Estate* (Cal., 1899), 56 Pac. R. 550.

¹ In *re Skair*, 5 Notes Cas. 57; In *re Hakewell*, 1 Deane, 14.

² *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. R. 382.

³ In *re Watkins*, L. R. 1 P. & D. 19; In *re Brewis*, 33 L. J. Prob. 124.

⁴ *Singleton v. Tomlinson*, 3 App. Cas. 404, 414.

⁵ *Magoohan's Will*, 117 Pa. St. 238, 14 Atl. R. 816. In *Chambers v. McDaniel*, 6 Ired. (N. C.) Law, 226, on p. 229, the court says: "The law is that if a testator in his will refers expressly to another paper, and the will is duly executed and attested, that paper, *whether attested or not*, makes a part of the will; but the instrument referred to must be so described as to manifest distinctly what the paper is that is meant to

be incorporated, and in such a way that the court can be under no mistake, and the reference must be to a paper already written and not to one to be written subsequently to the date of the will." A reference to a paper which, it is shown, was executed the same day, as follows, "remainder to persons named on another sheet, and inclosed in another envelope which shall not be opened until after the death of my said brother and sister," the legatees named in the will, is not sufficient to identify a paper contained in a sealed envelope on which was indorsed "not to be opened until after the death of my brother and sister." In *re Sander-son's Will*, 9 Misc. R. 574, 30 N. Y. Supp. 848.

⁶ *Cf. ante*, § 256.

⁷ *Tuttle v. Berryman*, 94 Ky. 553, 23 S. W. R. 345; 1 Redf., § 264.

of great length, and copying it in the court records would have resulted in large expense to the estate, the court declined to require it, but suggested that an affidavit, setting forth all the facts and describing the writing, be inserted in the record of the probate, so that all the persons interested might have due notice of the other instrument.¹

Ordinarily, all writings of a testamentary character and which are connected by reference are admitted to probate together.² If the original cannot be obtained, a properly certified copy would be received.³ If, however, the testator refers to a long document in which he has no property interest and under which he cannot claim title, and it is in the hands of others who refuse to produce it or permit a copy to be taken, the court of probate will not compel them to do so, but will omit the writing altogether from the record.⁴

The fact that a writing referred to in a will is omitted from the record of its probate will neither prevent a court of construction from regarding it as a constituent part of the will, nor give it the character of evidence merely. Thus, if the testator refers to existing entries upon his account books showing his intention as to the disposition of his property, the court will not permit such entries to be contradicted by parol, but will construe them as though they were inserted in the will itself.⁵ And in another case, decided in England, the vice-chancellor said:⁶ "If a will confirms an instrument which is sufficiently identified and probate passes, leaving in the clause containing the confirmation, the instrument must, I consider, be had regard to as if it *were set out in the probate*."⁷

¹ In the Goods of Astor (1876), L. R. 1 Prob. Div. 150, 153. See also In the Goods of the Marquis of Lansdowne, 3 Sw. & Tr. 194, 196, 32 L. J. Prob. 124, 126; In the Goods of Dundas, 32 Law Jour. Prob. 165; In re Willey's Estate (Cal., 1899), 56 Pac. R. 550.

² In re Lookhart, 1 Reports, 481, 69 Law Times, 21; In re Harris, L. R. 2 P. & D. 83, 84; In re Howden, 43 L. J. Prob. 26; In the Goods of Pewtner, 4 Notes Cas. 479; and see *post*, § 284.

³ In the Goods of Dickens 3 Curteis, 60, 1 Notes Cas. 398.

⁴ In the Goods of Sibthorpe, L. R. 1 P. & M. 106, 108; In re Battersbee, 2 Robertson, 83; Bizzey v. Flight, L. R. 3 Ch. D. 269.

⁵ Quihampton v. Going, W. N. 1876, 209.

⁶ Bizzey v. Flight, L. R. 3 Ch. Div. 269.

⁷ In spite of the rule in the text, which has received the support of the English cases, the power and right of the testator to bind the legatee by book entries or by false recitals in the will may well be doubted.

§ 283. **Will consisting of several unattached sheets.**—It is now well settled that the fact that the will is written on separate sheets of paper, and at different times, and that these separate sheets are not attached by some physical means, is in nowise material.¹ So, generally, the fact that the will is made up of several clauses, which are separated by blank spaces, with only one attestation clause for all, is not material; for all the writings must be taken together and construed as one will.² But the rule that one attestation and one execution are sufficient for several writings, constituting the last will, is only applicable when the intention of the testator that all the writings shall constitute his will is apparent *in the latest of them*. For, while it is undoubtedly the rule that an invalid will may be validated by its re-execution by a subsequent codicil, an unattested codicil to the will, which is written or signed *after the will* itself was executed, is not validated by the prior execution of the will, even though the papers refer to or are attached to each other.³

§ 284. **Separate wills of property located at home and abroad.**—If the testator, in executing separate wills of property located in England and America, clearly shows an intention to keep his English property separate from his American property, the court, having respect to the intention, ought to decline to admit the foreign will to probate as a part of the English will. But some memorandum ought to be appended to the probate, so that all persons interested may be put upon their inquiry, and may have notice of the foreign will.⁴ If, however, one will ratifies and confirms the other so as to incorporate it by reference, or if the two wills are not independent, the will which is the later may incorporate the earlier, and both ought to be admitted to probate and recorded, as they

If the testator, giving a legacy to a debtor or a child, directs that all debts which are due him from the legatee as they shall appear on his books are to be deducted and the debts are erroneously or intentionally very much overstated, it is gross injustice to prevent the legatee from showing this to be so, unless, of course, his acquiescence is a condition of the

legacy. This subject is discussed *post*, §§ 447, 510.

¹ *Barnewell v. Murrell* (Ala.), 18 S. R. 831; *Harp v. Parr*, 168 Ill. 459, 473; *Wikoff's Appeal*, 15 Pa. St. 281, 290.

² *Gordon v. Whitlock*, 92 Va. 722, 24 S. E. R. 342.

³ *Ante*, § 216 et seq.

⁴ *In re Astor* (1876), L. R. 1 Prob. Div. 150, 153; *In re Murray* (1896), Prob. 65; *ante*, § 282.

are, in fact, but one will.¹ Where a person domiciled in England made a will disposing of his real and personal property in England, and another will disposing of his real estate in Russia, and the persons to whom he has devised his Russian property enter into a covenant deed with him by which they agree to convey the proceeds of the Russian property to the executors of the English will, the covenant and the Russian will need not be admitted in the English probate, though both are referred to in it, the former as having been made and the latter as in contemplation.²

Where it is impossible to procure a copy of the foreign will, or where it could only be obtained at great expense, the court may omit it from the probate, though it may be expressly referred to in the English will.³ Where, in a foreign will, a person is named executor, probate will be granted to such will, and the person named in the will has the power of an executor in England. But where the foreign will confers powers upon a person which are not equivalent to the powers of an English executor, he will be granted probate with powers as near as possible to those created by the will.⁴ The testator may dispose of his personal property located abroad by a will separate and distinct from that referring to personalty located in the country of his domicile. He may appoint a different executor in each, and the courts of each country may grant probate of the will relating to the movable property which was within their jurisdiction at the date of the death of the testator.⁵

¹ *In re Lockhart*, 1 Reports, 481, 69 Law T. 21, 57 L. J. Prob. 313; *In re Harris*, L. R. 2 P. & D. 83, 84; *In re Howden*, 43 L. J. Prob. 26; *In the Goods of Crawford*, P. D. (1890), 185; *In the Goods of De La Rue*, L. R. Prob. (1890), 185; *In the Goods of Murray*, L. R. 1 Prob. (1896), 65, 71; *In the Goods of Calloway*, L. R. 15 Prob. 15 P. D. 147.

² *Goods of Tamplin*, 6 Reports, 538 (1894), Prob. 39.

³ *In re Dundas* (1863), L. J. 1 P. M. & A. 165, 166; *In re Lemme* (1892), Prob. 89; *In re Von Linden* (1896), Prob. 148, 150.

⁴ *In Goods of Briesemann* (1894), Prob. 260; *In Goods of Von Linden* (1896), Prob. 148, 149.

⁵ *In Goods of Seaman* (1891), Prob. 233.

CHAPTER XIII.

THE VALIDITY AND NATURE OF CONTRACTS TO EXECUTE WILLS.

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| <p>§ 285. The validity of agreements to devise.</p> <p>286. The jurisdiction of equity to enforce a specific performance.</p> <p>287. Election of remedies—Parties to the action.</p> <p>288. Effect of the Statute of Frauds on promises to devise land.</p> <p>289. The revocability of wills made in carrying out a contract to devise.</p> | <p>§ 290. What gifts on the part of the promisor constitute a sufficient performance of the contract.</p> <p>291. Adoption as a consideration for a contract to devise.</p> <p>292. The character and sufficiency of the proof required to establish a contract to devise.</p> <p>293. Contract to make will in favor of a charitable institution by an inmate.</p> <p>294. Contracts not to dispute wills.</p> |
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§ 285. **The validity of agreements to devise.**—The validity of a contract by which one of the contracting parties agrees with the other, either for a good or a valuable consideration, that he will make a will devising him property, whether real or personal, is valid beyond doubt. Such contracts have been sustained and enforced in England and America from the earliest times.

The rules of law which are applicable to the subject of contracts generally are applicable to these agreements. A detailed discussion of these rules and principles in this work is both unnecessary and inappropriate. It may, however, be said that a contract to dispose of property by will for the benefit of the promisee, in order to be enforceable, either in law or equity, must be based upon a valuable or, at least, upon a good consideration.¹ An agreement by the promisee to support the

¹ *Croft v. Layton*, 35 Atl. R. 783, St. 143, 80 W. N. C. 439; *Allbright v. Hannah*, 103 Iowa, 98, 101; *Parsell v. Stryker*, 41 N. Y. (1870), 480; *Carmichael v. Carmichael*, 73 Mich. 76, 40 N. W. R. 173; *Woods v. Matlock* (Ind. App.), 48 N. E. R. 384.

68 Conn. 91 (1897); *Purviance v. Purviance* (Ind., 1896), 43 N. E. R. 364; *McGuire v. McGuire*, 11 Bush (74 Ky., 1876), 142; *Drake v. Lanning*, 49 N. J. Eq. 452, 24 Atl. R. 378; *In re King's Estate*, 24 Atl. R. 661, 150 Pa.

promisor during the life of the latter, to board, nurse and clothe him, and to furnish him with medical attendance while he lives, and to bury him, is a sufficient consideration for a promise on the part of that person to give property by will to the other party.¹

§ 286. **The jurisdiction of equity to enforce a specific performance.**—An agreement by which a person obligates himself, for a valuable consideration, to devise or bequeath property to the other contracting party is in *no respect contrary to principles of public policy*. The specific performance of such a contract will be granted in equity against the personal representatives of the promisor; for courts of equity have, from time immemorial, possessed jurisdiction in such a case to carry out the intention of the parties and to afford a remedy where the remedy at law is clearly inadequate. Equity will not make a will to take the place of that which has not been made. But, acting upon well-recognized principles, the court of equity will fasten a trust upon the estate of the promisor in favor of the promisee which will attach to that estate in the hands of his heirs, executor, next of kin or other persons, and which will be enforceable against them.² In such a condition of affairs a court of equity will compel the legal owner of the property, who takes by descent or devolution from the promisor, to execute a conveyance of the property to the promisee.³

And where the promisor, after entering into a valid contract to devise the property, conveys it to third parties without consideration, a court of equity will, upon the death of the promisor, decree that the conveyance shall be set aside as against the party with whom he has contracted to devise it.⁴

¹ *Brady v. Smith*, 8 Misc. R. 465, 28 N. Y. Supp. 776; *Fuchs v. Fuchs*, 48 Mo. App. (1892), 18; *Smith v. Pierce*, 65 Vt. 200 (1893), 25 Atl. R. 1092.

² *Duval v. Duval* (N. J., 1897), 35 Atl. R. 750; *Eldred v. Warner*, 1 Ariz. 175, 23 Pac. R. 800; *Korminsky v. Korminsky*, 2 Misc. R. 138, 21 N. Y. Supp. 611; *Fogle v. Protestant Episcopal Church* (S. C., 1897), 26 S. E. R. 99; *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. R. 173; *Bird v. Pope*, 73 Mich. 433; *Gates v. Gates*, 54 N. Y. S. 454; *In re Keep's Will*, 2 N. Y. Supp. 750; *Johannes v. Martian*, 48 N. Y. Supp. 102, 23 App. Div. 561; *Colby v. Colby*, 81 Hun, 221, 24 Civ. Pro. Rep. 148, 30 N. Y. Supp. 677; *Newton v. Newton*, 46 Minn. 38, 48 N. W. R. 450; *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. R. 218; *Emery v. Darling*, 50 Ohio St. 100, 33 N. E. R. 715.

³ *Emery v. Darling*, 50 Ohio St. 160 (1893), 33 N. E. R. 715.

⁴ *Kastell v. Hillman*, 53 N. J. Eq.

In some states courts of probate have power, by statute, to decree the specific performance of a contract to devise.¹ In the absence of such a statute the probate court has no power to compel the specific performance of a contract to devise. The party aggrieved must seek his redress in a judicial tribunal possessing equity powers.²

§ 287. Election of remedies—Parties to the action.—The promisee may seek the aid of equity to have a specific performance of the contract decreed, and, if he shall substantiate his allegations, the persons who hold the property, real or personal, to the prejudice of his right will be decreed to hold it as trustees for him. The party who claims the property of the deceased under the contract may waive his equitable remedy and sue the executor for the value of the services rendered, or for damages for the breach of the contract. For it is a well-settled principle of law that one who renders services under a contract by which he is to receive his compensation by will, stands *in the position of a creditor* of the person receiving the services, and may recover from *his* personal representative upon a *quantum meruit*. And the plaintiff is not limited, in suing the executor, to the actual amount which the deceased promised to bequeath him, but he may sue for and recover as much as the services are worth.³

49, 30 Atl. R. 535. A breach of contract creating an immediate right of action arises where a man, having promised, in consideration of marriage, to devise real property to his wife, conveys it by a deed to third persons. On his death the court may exercise its jurisdiction to compel a specific performance of the contract to devise, as against every person claiming under the deceased who is not a *bona fide* purchaser for value. *Synge v. Synge*, 9 Reports, 265 (1894), 1 Q. B. 466.

¹ *Appley v. Murphy*, 50 Fed. R. 376; *Hart. Texas Dig.*, art. 1070; *Kleeberg v. Shrader* (Mich., 1897), 72 N. W. R. 59; *In re Hoffner's Estate*, 29 Atl. R. 33, 161 Pa. St. 331, 34 W. N. C. 297.

² *In re Gloucester's Estate*, 11 N. Y. S. 899.

³ *Whetstine v. Wilson*, 104 N. C. 385; *Porter v. Dunn*, 61 Hun, 310, 16 N. Y. Supp. 77, reversed in 181 N. Y. 314, 30 N. E. R. 122. *Contra*, *Collier v. Rutledge*, 136 N. Y. 621, 32 N. E. R. 626; *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. R. 583; *Whitcomb v. Whitcomb*, 92 Hun, 443, 36 N. Y. Supp. 607. But see and compare *Succession of McNamara*, 48 La. Ann. 45, 18 S. R. 908; *Clark v. Cordry*, 69 Mo. App. 6. The fact that a person has made a contract to devise her property to certain persons, and has executed a will in pursuance thereof, does not affect the right to probate of a subsequent will executed by her, giving her property to others, since the probate of a will establishes only its due execution, and the parties, if entitled to the property under the contract,

§ 288. Effect of the Statute of Frauds on promises to devise land.— A parol promise to devise land is void under the Statute of Frauds.¹ So an agreement by virtue of which the promisor binds himself to leave all his property, real and personal, to the other contracting party, being void as to the real estate under the Statute of Frauds, will not be enforced in equity as regards the personal property where the contract is one and indivisible. Failing in part, it may be set aside altogether.² But a part performance of the contract to devise by the plaintiff will prevent the application of the Statute of Frauds,³ and he may then recover from the estate of the promisor under a *quantum meruit*.⁴ Thus, where a father promised

would have their remedy by way of contract or trust. *Sumner v. Crane*, 155 Mass. 483, 29 N. E. R. 1151. Where a son removes with his family to his father's home on an express promise by the latter that, if the son will attend to and care for him while he lives, he will devise him property; and the son faithfully performs his part of the agreement, though the father fails to make the will, because of his subsequent insanity, continuing until his death, the son may recover from the administrator of the father upon a *quantum meruit*, for the actual value of his services, not to exceed the value of the property promised to be devised, and deducting all that he has received during the life-time of the father which was not necessary for the father's support. *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. R. 588. The fact that the exact amount of the residuary estate has not been ascertained by the executors is not a valid reason for dismissing an action against them based on an agreement by the testator that he would leave the plaintiff as much as certain other persons would receive under the residuary clause of his will. This objection goes, not to the right of action, but to the mode of ascertaining the amount of the share of plaintiff. *Andrews v. Brewster*,

124 N. Y. 433, 26 N. E. R. 1024. The party who is dissatisfied with a testamentary provision made for her may repudiate the will and sue at once. *Green v. Orgain* (Tenn.), 46 S. W. R. 477.

¹ *Pond v. Sheean* (Ill., 1890), 23 N. E. R. 1018; *Demass v. Robinson*, 46 Mich. 62; *Fuchs v. Fuchs*, 48 Mo. App. 18; *In re Sherman*, 24 Misc. R. 65, 53 N. Y. S. 53; *Hale v. Hale* (Va.), 19 S. E. R. 739.

² *Ellis v. Cary*, 74 Wis. 176, 42 N. W. R. 252; *Grant v. Grant*, 29 Atl. R. 15, 63 Conn. 530; *In re Kessler*, 87 Wis. 660, 59 N. W. R. 129.

³ *Fuchs v. Fuchs*, 48 Mo. App. 18; *Van Tine v. Van Tine* (N. J.), 15 Atl. R. 249; *Korminsky v. Korminsky*, 2 Misc. R. 138; *Stevens v. Lee*, 70 Tex. 279, 8 S. W. R. 40; *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. R. 218; *In re Sherman*, 24 Misc. R. 65, 53 N. Y. S. 376.

⁴ An oral agreement by husband and wife to devise land to each other is taken out of the statute by a full performance by the husband and the acceptance of the benefit by the wife. The latter will be enjoined in equity from a violation of this contract at the instance of third parties claiming under the husband. *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. R. 173.

his sons that if they would purchase land and convey it to him for a home during his life he would devise it to them, and the sons bought and paid for the land, the heirs of the father, to whom the land descended on his death intestate, cannot set up the bar of the statute, as the part performance by the sons effectually renders it inapplicable.¹ So where the deceased entered into an arrangement by which the plaintiff agreed to care for him during his illness, in consideration of which the plaintiff was to receive his property at his death, it was held that the deceased, by permitting the plaintiff to enter into possession prior to his death, had partly performed the contract, and that the Statute of Frauds was not applicable.²

§ 289. The revocability of wills made in carrying out a contract to devise.—The general rule under which the revocable character of wills is universally admitted to exist is subject to a seeming exception, where the execution of the will is a part of a contract to make a will, and the person in whose favor the devise was made has gone into possession and made expenditures upon faith in the contract. Perhaps it is hardly correct to claim that the will is irrevocable. While the testator may destroy the will or execute another revoking it, the contract itself cannot be rescinded, and will be enforced by the court in favor of the person who has acted upon it.³ If, however, no specific sum is mentioned to be devised, and the person making the promise merely agrees that he will leave the other party what he may have in his possession at his death, he retains by implication all his rights over his property during life, and may dispose of it by voluntary gift, provided there is no intent to defraud the promisee.⁴

¹ *Korminsky v. Korminsky*, 2 Misc. R. 138, 21 N. Y. Supp. 611; *Heath v. Heath*, 42 N. Y. Supp. 1087; *Bird v. Pope*, 78 Mich. 488, 41 N. W. R. 514.

² *Smith v. Pierce*, 25 Atl. R. 1092, 65 Vt. 200; *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. R. 218.

³ *Tuit v. Smith*, 137 Pa. St. 35, 26 W. N. C. 568; *Bird v. Pope*, 78 Mich. 483, 41 N. W. R. 514; *Keagle v. Peesell*, 91 Mich. 618.

⁴ *Austin v. Davis* (Ind.), 26 N. E. R. 890; *Nash v. Burchard*, 87 Mich. 85,

49 N. W. R. 492. In such cases the remedy of the aggrieved party is in equity in the absence of statute conferring the power to decree specific performance upon probate courts. Where the testator executes a will revoking an earlier will which had been made in pursuance of a contract to devise, the later instrument must be admitted to probate, subject to the rights of the parties to the contract to seek their remedy in another forum, as the court of probate is

§ 290. **What gifts on the part of the promisor constitute a sufficient performance of the contract.**—The party who has made the promise to give property by his will may have made some testamentary provision for the other party to the contract which the latter claims is not a sufficient compliance with the terms of their agreement. This is usually the case where the terms of the contract describing the land or other property to be given are vague, indefinite and open to doubtful interpretation. Generally a substantial rather than a literal compliance with the terms of the contract is all that can be required. Thus, where a husband had by ante-nuptial contract agreed that he would upon his death leave to his wife a home, and whatever amount, payable at such periods as might be most convenient to her, would enable her to live in comfort, and in case of sickness whatever might be necessary for medical attendance, it was held that the contract had been sufficiently complied with by a devise to her of his homestead for her life or during widowhood, the household goods and two horses, together with the sum of \$5,000 in trust, to be used for the benefit of the widow, according to the discretion of the trustees.¹

§ 291. **Adoption as a consideration for a contract to devise.**—The surrender of a child by its parents to a person who, at the time of the surrender, agrees to adopt the child as his own and to devise him property at his death, is a valid and sufficient consideration. The child adopted or his heirs or personal representatives are entitled to the specific performance of the agreement after the death of the promisor, though the writing signed by the latter does not constitute a valid adoption under a statute. The court will seek the intention of the parties; and, when this is ascertained, the promisee will not be

without jurisdiction to enforce contracts. In *re Gloucester's Estate*, 11 N. Y. Supp. 899.

¹*Thompson v. Tucker-Osborn* (Mich., 1897), 69 N. W. R. 730. Cf. *Major's Appeal*, 125 Pa. St. 109, 17 Atl. R. 535; *Snyder v. Snyder*, 77 Wis. 95, 45 N. W. R. 818. Where a wife holding her husband's note based upon a valuable consideration gives it to him by gift *causa mortis*, and, though she

recovers, permits him to destroy it, upon the understanding that he will devise her certain land in addition to property already given her by an existing will, she is entitled to recover the amount of the note from the residuary devisee of the land, when the husband, giving her a life estate, devises the remainder to other parties. *Lisle v. Tribble*, 92 Ky. 804, 17 S. W. R. 742.

prejudiced in enforcing his rights by the neglect of the promisor to secure a legal adoption in accordance with the statutory formalities.¹ A parol promise to adopt and to devise land to the adopted person is within the Statute of Frauds. If, however, the parents of the child have surrendered all control over him, or if, being an orphan, he has of his own volition taken up his residence with the promisor, and assisted and rendered the assistance in his household which is commonly rendered by children, or has in any way acted as a child towards the promisor, the agreement is taken out of the Statute of Frauds and is enforceable at the instance of the adopted child.²

§ 292. **The character and sufficiency of the proof required to establish the contract to devise.**—The burden of proof to establish the making of the contract is upon the plaintiff. He must establish it by clear and reasonably convincing evidence. The details of the agreement must appear, and the consideration and the time and place must be shown with reasonable definiteness.³ An oral declaration by the testator that he intended the plaintiff to have all his property, and the fact that the latter, who was his child, lived with him and rendered such services as are usually rendered by children when members of their father's family, are not enough.⁴ Thus, where it is claimed that a promise to devise was made in consideration of services

¹ *Healey v. Simpson*, 20 S. W. R. Supp. 274, 6 Dem. Sur. 473; *Wilson v. Heath*, 23 Misc. R. 714; *In re Wright's Estate*, 155 Pa. St. 64, 25 Atl. R. 877,

² *Van Tine v. Van Tine* (N. J.), 15 Atl. R. 249; *Grant v. Grant*, 63 Conn. 530, 29 Atl. R. 15; *Quinn v. Quinn*, 5 S. Dak. 328, 58 N. W. R. 808; *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. R. 788; *Wilson v. Heath*, 53 N. Y. Supp. 166, 23 Misc. R. 714.

³ *Owens v. McNally* (Cal., 1896), 45 Pac. R. 710; *Sloninger v. Sloninger*, 161 Ill. 270, 43 N. E. R. 1111; *Brown v. Garten*, 89 Iowa, 374, 376; *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. R. 345; *In re Sherman*, 24 Misc. R. 65; *Wilmer v. Borer* (Kan., 1897), 46 Pac. R. 181; *Teats v. Flanders*, 24 S. W. R. 126, 118 Mo. 666; *Smith's Executor v. Houseman* (Va.), 20 S. E. R. 830; *Rice v. Hartman*, 84 Va. 256, 4 S. E. R. 621; *In re Ryder's Estate*, 3 N. Y.

⁴ *Scoggins v. Smith*, 31 S. C. 605, 9 S. E. R. 971; *Sproker v. Dow*, 48 Hun, 619, 1 N. Y. Supp. 240. The oral declarations of the decedent evincing his intention in regard to the disposition of his property, while always admissible to show the existence of a contract, are not enough alone, and are usually quite unreliable because of the fact that their utterance is often prompted by a desire to placate those whom they favor. *Cessna v. Miller*, 85 Iowa, 725, 51 N. W. R. 50.

to be rendered, or support to be given, the evidence must be definite and satisfactory as to the character of the services or support.¹ But in many cases the courts have dispensed with evidence of the usual formal execution of a contract, particularly where the parties dwelt together in one family or household. The courts will look to the intention rather than to the form. So, where the deceased had taken the plaintiff, who was his illegitimate child, into his family at an early age, recognized her as his child, gave her an education and board and clothing, and she remained in his household forty years, performing the duties of a daughter to him and his wife until his death, and she had refused advantageous offers of marriage upon the solicitations of the deceased and his suggestions that she would receive his estate upon his death, and she relied upon those suggestions, the court held that a sufficient contract to devise was made out.²

§ 293. **Contract to make will in favor of a charitable institution by an inmate.**—Many homes for the aged stipulate with those who are admitted as inmates that they shall execute wills or assignments transferring to the home all the property which they may own, or which they may afterwards acquire. The validity of such wills and of the contract under which they are executed is not to be questioned. The consideration of the contract on the part of the institution is the furnishing of support and maintenance for the testator during his life, and in this respect the contracts stand upon the same basis as those referred to in previous sections. Inasmuch, however, as it is clearly the law that homes for aged persons and similar charitable institutions may expel an inmate for persistent violation of rules, although such inmate may have paid the regular fee for admission, which fee is thereby forfeited, the question may arise in such case whether the will is thereby revoked. Although no case is found involving exactly this question, no difficulty arises in determining it upon general principles. It is clear that the institution, having elected to rescind the contract by expelling the testator, cannot claim to have it enforced so

¹ *In re Cook's Estate*, 12 Pa. Co. Ct. v. *Hendricks*, 99 Mo. 478, 12 S. W. R. R. 621; *Judd v. Burrell*, 67 Hun, 650, 887.

22 N. Y. Supp. 212; *Edsons v. Parsons*, ² *Waddell v. Waddell* (Tenn., 1897), 155 N. Y. 555, 50 N. E. R. 265; *Davis* 42 S. W. R. 46.

far as the probate of the will is concerned. In such circumstances equity would grant an injunction restraining probate upon the application of the next of kin of the inmate. In this connection it may be remarked that the by-laws and regulations of the institution constitute a part of the contract between the inmate and the institution, but only so far as they are proved to have been brought to the knowledge of the former. In a case where a person, on being admitted to a home for the aged, stated that he was willing to pay a certain sum and assign all property that he might acquire subsequently to the institution in conformity with its regulations and by-laws, the court held that his will made *before his admission, leaving his property to a third person*, was entitled to probate as against the claim of the institution that upon his admission he had assigned all his property to them.¹

§ 294. **Contracts not to dispute wills.**—The settlement of controversies by reason of which the harmony of families is destroyed is favored by the law. Courts of equity will find reasons why the agreement to avoid litigation should be effectuated. In the absence of statute giving a probate court power and jurisdiction to enforce the specific performance of contracts, an agreement to settle a pending litigation cannot be interposed as a bar to probate, and the party must call on equity to enjoin the prosecution of the proceedings which are a non-performance of the contract.² An heir or one of the next of kin who has contracted *not to contest a will* is estopped from doing so, not only upon the grounds of undue influence or testamentary incapacity,³ but as well for invalidity of execution.⁴ A family agreement to settle difficulties may be made without consideration other than mutual affection and a desire to avoid litigation. The mutual surrender of rights is usually the consideration,⁵ though there must be in all cases the utmost good faith and a complete disclosure of all relevant circumstances bearing upon

¹ In *re Maul's Estate*, 40 Atl. R. 1010, 186 Pa. St. 477. Pac. R. 414; *Gore v. Howard*, 94 Tenn. 577, 30 S. W. R. 730.

² *Shurte v. Fletcher* (Mich.), 69 N. W. R. 233. *Contra*, *Stringfellow v. Early* (Texas, 1897), 4 S. W. R. 871.

³ *Garcelon's Estate*, 104 Cal. 570, 33

⁴ *Gay v. Sanders*, 28 S. E. R. 1019.

⁵ *Williams v. Williams*, L. R. 2 Ch. 294; *Westby v. Westby*, 2 D. & W. 503; *Pearse v. Pearse*, 7 Cl. & F. 280.

the rights of the parties.¹ Where a party acting under competent advice in a settlement with her trustees, all confidence in whom he expressly renounces, makes a settlement with them and they disclose everything which they know, it will not be set aside because they might have acquired a fuller knowledge by a more diligent search.²

The beneficiaries of a will may, *after probate*, agree to *set aside its provisions and distribute the estate of the testator* in a manner wholly different from that in which the will disposes of it.³ But such an agreement is strictly construed, and is, of course, not binding upon one who has not signed it, nor will it, when its provisions relate expressly to a will, be applicable to a codicil subsequently discovered.⁴

¹ *Maxon v. Payne*, L. R. 8 Ch. 881; *Gordon v. Gordon*, 3 Sw. 400; *Stapilton v. Stapilton*, 1 Atk. (1789), 2.

² *Colton v. Stanford*, 82 Cal. 351, 23 Pac. R. 16.

³ *Cuthbert v. Chauvet*, 20 N. Y. S. 336, 65 Hun, 624; *Bracken v. Davis*, 22 Atl. R. 20, 133 Pa. St. 104.

⁴ *Bracken v. Davis*, 22 Atl. R. 20, 133 Pa. St. 104. An infant may, with

the approval of a court of equity, enter into a family compromise. But he cannot, against the advice of counsel, be compelled to enter into one by an order of the court. In *re Birchall*, L. R. 16 Ch. D. 43. See also *Todd v. Todd*, 42 N. E. R. 849, 159 Ill. 408; *Riddle v. Pierce*, 18 Ind. App. 239, 14 N. E. R. 475.

CHAPTER XIV.

THE TESTATOR'S LANGUAGE DESCRIPTIVE OF PROPERTY DISPOSED OF IN THE WILL.

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| <p>§ 295. Definition of the word "estate"—When land passes by this word.</p> <p>296. Circumstances under which the word "estate" will include personal property only.</p> <p>297. The meaning of the word "property"—When real estate will be included.</p> <p>298. Tenements defined.</p> <p>299. What may be included in the devise of a messuage.</p> <p>300. Meaning of the word "premises."</p> <p>301. Land and its appurtenances.</p> <p>302. Definition and signification of the word "house."</p> <p>303. The meaning of the word "farm."</p> <p>304. The meaning of "homestead."</p> <p>305. Property described as in the occupancy of the testator.</p> <p>306. Definition and disposition of emblements.</p> <p>307. The doctrine of <i>ejusdem generis</i>.</p> | <p>§ 308. Personal property construed.</p> <p>309. The operation of the word "effects."</p> <p>310. Construction of the words "goods" and "chattels."</p> <p>311. Movables defined.</p> <p>312. The meaning of the word "money."</p> <p>313. Bequests of stocks, etc.</p> <p>314. The meaning of the terms "household furniture" and "household goods."</p> <p>315. Stock on farm, live-stock, etc.</p> <p>316. Personal property described by a reference to its locality.</p> <p>317. Gift of "proceeds"</p> <p>318. Direction to provide a "home."</p> <p>319. The terms "legacy" and "devise" distinguished.</p> <p>320. Share, part or portion.</p> <p>321. Definitions of the words "also," "likewise," "furthermore," "moreover," "item," etc.</p> <p>322. The use of "between" and "among."</p> |
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§ 295. Definition of the word "estate"—When land passes by this word.—The word "estate," taken in its primary sense as used in a will, without anything in the context to limit it, is a word of very extensive meaning. It is nearly synonymous with the word "property," where that word is not qualified by the addition of the word "personal." Under the word "estate," used in its primary sense, real property of every description will ordinarily pass, and the presumption is that the testator, in using the word, uses it in its broad and inclusive signification, unless the context restricts its meaning to some

particular species of property.¹ If the testator, in the introductory clause of his will, shows an intention to die testate as to all he owns, it is very reasonable to presume, when he employs the word "estate" in the residuary clause, that he intends to dispose of his real property. Even though the words in the residuary clause would, without this introductory expression of a general intention to die testate, fail to include real property, they may, by the addition of this introductory language, be extended in their meaning to include such property.²

At common law, words of succession or perpetuity were generally required to convey a fee-simple title by deed.³ But it has been repeatedly held, even in the absence of a statute abrogating this rule, that a devise of the "estate" of the testator, or of the *balance of his estate*, would include the fee-simple in lands owned by him, unless the meaning of the word "estate" was restricted by the context, or unless it was employed merely to indicate the locality in which the land was situated, *e. g.*, "*my estate in the town of A.*"⁴ The English cases in general

¹ Warner v. Williams, 54 Conn. 470, 9 Atl. Rep. 186; Goudie v. Johnston, 109 Ind. 427, 431; Crew v. Dixon, 129 Ind. 85, 91; Doe v. Kinney, 3 Ind. (1851), 50, 51; Doe v. Harter, 7 Blackf. (Ind.) 488, 490; Deering v. Tucker, 55 Ma. (1867), 284, 287; Chapman v. Chick, 81 Me. 109, 117, 16 Atl. R. 407; Josselyn v. Hutchinson, 21 Me. 339; Bullard v. Goffe, 20 Pick. (37 Mass.) 252, 257; Tracy v. Kilburn, 3 Cush. (57 Mass.) 557, 558; Godfrey v. Humphrey, 18 Pick. (Mass.) 537, 539; Wilbur v. Smith, 5 Allen, 194; Kellogg v. Blair, 6 Met. (Mass.) 822, 325; Hooper v. Hooper, 9 Cush. (51 Mass.) 123, 128; Putnam v. Emerson, 7 Met. (Mass.) 880; Boston S. D. Co. v. Mixter, 146 Mass. 100, 15 N. E. R. 141; Houghton v. Hapgood, 18 Pick. 154, 157; Norris v. Clark, 10 N. J. Eq. 51, 57; Andrews v. Brumfield, 32 Miss. 107, 117; Den v. Drew, 8 N. J. Eq. 68; Whittaker v. Whittaker, 40 N. J. Eq. 33, 37; Brearly v. Brearly, 9 N. J. Eq. 21; Hartson v. Elder, 50 N. J. Eq. 522, 525; Sites v.

Eldredge, 45 N. J. Eq. 632, 637, 18 Atl. R. 214; Jackson v. Merrill, 6 Johns. 185, 191; Jackson v. De Lancey, 11 Johns. (N. Y., 1814), 365, 373; affirmed, 13 Johns. 587; Turbett v. Turbett, 3 Yeates (Pa., 1802), 187; Monroe v. Jones, 8 R. I. 526, 529; Arnold v. Lincoln, 8 R. I. 384, 385; Grimes v. Smith, 70 Tex. 217, 8 S. W. R. 33; Hart v. White, 26 Vt. 260, 267; Cole v. Clayborn, 1 Wash. (Va., 1794), 262; Davies v. Miller, 1 Call (Va., 1797), 127, 132; Morgan v. Huggins, 42 Fed. R. 86; Archer v. Deneale, 1 Peters (26 U. S.), 585, 588; Stump v. Deneale, 2 Cranch C. C. 640, 644; Blagge v. Miles, 1 Story C. C. 426.

² Smith v. Smith, 17 Gratt. (Va.) 268, 274.

³ 2 Black. Com., p. 296.

⁴ Backus v. Presbyterian Ass., 25 Atl. R. 856, 860, 77 Md. 50; Beall v. Holmes, 6 Harr. & J. (Md., 1825), 208; Chapman v. Chick, 81 Me. 109, 117, 16 Atl. R. 407; Canedy v. Jones, 19 S. C. 301. See also cases cited *supra*.

sustain the above rule, but it must be remembered that the almost universal custom of holding land in England upon leases for long terms of years, together with the frequency of copyhold estates in that country, has the effect of rendering the English decisions not altogether applicable to the law of real property as it exists in the United States. In England the question usually arises in this form in construing the word "estate:" Does it include land of which the testator is seized in fee-simple, or should it be confined to land which he holds by copyhold or under a lease for years? In the United States, where land is seldom held upon leases, the question is usually between land owned in fee-simple and personal property, as money in bank, securities, etc. The English cases support the proposition that a gift of the residue of the testator's estate will include lands owned by him in fee-simple¹ and copyhold lands,² even where the word "estate" is collocated in the context with words such as "debts," "chattels," "goods," etc., exclusively indicating personal property. Indeed, it may be said without doubt that there must be a very clear indication of an intention on the part of the testator to confine the meaning of the word "estate" to his personal property. The tendency of the recent cases relating to the extent and meaning of the word is to include lands held in fee-simple. If the testator has in one portion of his will specifically devised a particular piece of land, and then bequeaths the rest and residue of his *estate*, or of *his property*, to a particular person, the presumption is very strong that by the expression "rest and residue" he means the residue of his real estate, as well as the residue of his personal.³ But this circumstance, though of value, may be dispensed with; for, *even where the testator has only disposed of his personal property*, as a money legacy, in one clause of his will, and devises "all the rest and residue of his estate," etc.,

¹ Woollam v. Kenworthy, 9 Ves. 137; Pitman v. Stevens, 15 East, 505; Smith v. Coffin, 2 H. Bl. 445; Churchill v. Dibben, 9 Sim. 447; Shaw v. Bull, 12 Mad. 592; Terrell v. Page, 1 Ch. Cas. 262, 1 Eq. Cas. Ab. 209; Scott v. Albertry, Comyns, 337, 8 Vin. Ab. 229; Hogan v. Jackson, Cowp. 299, 3 B. C. C. Toml. 388.

² Jongsma v. Jongsma, 1 Cox C. R. 362.

³ Bebb v. Penoyre, 11 East, 160; Smith v. Coffin, 2 Hen. Bl. 445; Roe d. Penwarden v. Gilbert, 3 Brod. & Bing. 85; Doe d. Andrew v. Lainchbury, 11 East, 290.

the word "estate" may be construed to include the real property, none of which had been specifically devised, as well as the actual rest and residue of the personal property.¹

§ 296. **Circumstances under which the word "estate" will include personal property only.**—The earlier English cases showed a decided tendency to restrict the meaning of the word "estate" to personal property, meaning thereby everything *except freehold lands*. Thus, where the testator had devised the "residue of his estate and chattels, real and personal," the court held that freehold land did *not* pass, but that the testator, having given only legacies in the former portion of his will, did not, by the "residue of his estate," mean the residue of his land, but the residue of his personal estate only.²

However much we may respect the authority of the early cases, we must remember that they were decided when the rules of testamentary construction were in their inception, and in a country where the heir was peculiarly favored by the law. As has been explained in the preceding paragraph,³ these cases have been by implication, if not expressly, overruled by subsequent decisions of the same courts. The modern tendency, both in England and the United States, is to give such words as "estate," "property" or "effects" their broadest meaning, consistent with a true construction of the testator's intention. Notwithstanding this, many exceptions may be found. If the word "estate," as used by the testator, is preceded or followed by an enumeration of various classes of property, all of which are personal property in the strict sense and meaning of that word, it will be restricted to that class of property.⁴ Thus, where the testator devised the "*residue of his furniture and estate*,"⁵ or where he devised all his "*estate, consisting of the residue of money, plate, jewels, leases, judgments, mortgages*," etc.;⁶ or where he gave "*the rest and residue of his estate with all the*

¹ *Tanner v. Morse*, Cas. Temp. Talb. 284; *Attree v. Attree*, L. R. 11 Eq. 280; *Smyth v. Smyth*, L. R. 8 Ch. D. 561; *Gyett v. Williams*, 2 Jo. & Hem. 429.

² *Marchant v. Twisden*, Gilb. Eq. Cases, 30, 1 Eq. Cas. Ab. 211 (1712). See also *Cliffe v. Gibbons*, 2 Ld. Raym. 1324, 1326. Where no mention had

been made of land in the will, it did not pass. Cf. *ante*, § 295.

³ See § 295.

⁴ *Post*, § 307.

⁵ *Bullard v. Goffe*, 20 Pick. 252, 258; *Havens v. Havens*, 1 Sandf. Ch. (N. Y., 1844), 324.

⁶ *Timewell v. Perkins*, 2 Atk. 102.

*furniture to be divided,"*¹ the effect of the context is to restrict the meaning of the word "estate" to personal property alone.²

§ 297. The meaning of the word "property"—When real estate will be included.—The word "property," in its primary sense, standing alone, is a term of the most extensive meaning. It includes every description of things, tangible or intangible, visible or invisible, which may be subject to ownership. It comprises every estate in things, whether present or future, vested or contingent.³ Everything that a man can dispose of, both real and personal, movable and immovable, may, in a technical sense, be called his property. Hence, as a rule, where it is unrestrained by the context, a general devise of "property" will comprise all the land of the testator otherwise undisposed of, together with all easements, franchises and incorporeal hereditaments owned by him.⁴ If the testator has by apt words disposed of all his *personal property*, a subsequent devise of all his *property* will, of course, be confined to real estate owned by him.⁵ And a devise of *property owned by the*

¹ *Bebb v. Penoyre*, 11 East, 160.

² *Roe d. Helling v. Yeud*, 2 Bos. & Pullen, 211; *Bailie v. Gale*, 2 Ves. 51. A devise of "*all my estate, real and personal, I shall inherit from my father*," passes land inherited from the testator's mother, where the father of the testator was living at his death. The general words are not restrained by the particular expression. *Graham v. Grogan*, 132 Pa. St. 79, 25 W. N. C. 314, 19 Atl. R. 56; *Graham v. Knowles*, 140 Pa. St. 325. Where the word "estate" is employed in reference to a particular fund, as in the expression, "all my estate in government bonds," it includes not only the *corpus*, but all premiums and interest due thereon. *Deering v. Tucker*, 55 Me. (1867), 284, 287. See also *post*, § 409. In *Andrews v. Brumfield*, 32 Miss. (1856), 107, 115, a devise of "*all my estate*" was held to be a sufficient execution of a power to appoint land.

³ 2 Black. Com., p. 16.

⁴ *Jameson's Appeal*, 99 Ill. 103; *Mor-*

gan v. McNeeley, 26 N. E. R. 395, 126 Ind. 537; *Stanton v. Lewis*, 26 Conn. 449; *Wheeler v. Dunlap*, 13 B. Mon. (5 Ky., 1852), 291; *Chapman v. Chick*, 81 Me. 109, 117, 16 Atl. R. 407; *Benson v. Linthicum*, 75 Md. 141, 23 Atl. R. 133; *Smith v. Hutchinson*, 61 Mo. 33; *Morris v. Henderson*, 37 Miss. (1859), 492; *White v. Keller*, 68 Fed. R. 796, 15 C. C. A. 683, 687; *Lang v. Barbour*, 119 Mass. 523, 525; *Jackson v. Housel*, 17 Johns. (N. Y., 1819), 581; *Pruden v. Paxton*, 79 N. C. 446; *Rossetter v. Simmons*, 6 Serg. & R. (Pa., 1820), 452; *Zerbe v. Zerbe*, 84 Pa. St. 147; *Bradford v. Bradford*, 6 Whart. (Pa., 1840), 241, 244; *Monroe v. Jones*, 8 R. I. 526; *Den v. Payne*, 5 Hayw. (6 Tenn., 1818), 104; *Moffett v. Moffett*, 67 Tex. 644; *Doe v. Langlands*, 14 East, 370; *Doe d. Morgan v. Morgan*, 6 Barn. & Cress. 512; *Soulard v. United States*, 4 Pet. 512; *In re Roberts*, 55 L. T. 493, 35 W. R. 176.

⁵ *West v. Randle*, 79 Ga. 28, 3 S. E. R. 454, 456; *Howland v. Howland*, 100 Mass. 222, 223.

testator after the expiration of a prior life estate will carry a fee in the property, if he was the owner of the fee.¹

A general gift of *all* the property of which the testator is possessed may sometimes be restrained as to its locality by the context; as where, for example, he states the property above referred to is "*situated at A.*"² The meaning of the word "property" is particularly subject to be restricted by the context with which it is surrounded. Thus, for example, a devise of "*my property, money and effects,*"³ or of "*my property, consisting of bonds, mortgages, stocks,*" etc.,⁴ will be restrained in its meaning to comprise property of the same kind⁵ as the particular items mentioned.⁶ But if the word is used in its restricted sense to refer to personal property alone, it will include not only money, but also promissory notes, certificates of deposit and choses in action as well as tangible things in the possession of their owner. Thus, under this word will be included promissory notes and money on deposit and in the possession of the testator at his death,⁷ stocks, bonds and other securities;⁸ and a residuary clause disposing of whatever of "*my property shall remain after paying a legacy*" will carry that legacy when it lapses.⁹ A devise of "*my property which has been devised to me*" will not include the proceeds of the sale of such property by the testator. Nor will a devise of "*my undivided interest and property*" in the estate of a deceased person include money which the testator received from the estate subsequently to the execution of the will, though it may include the proceeds of the sale of land due the testator from the estate at the date of his death. Under the rule that the will speaks from the death of the testator, the legacy is adeemed *pro tanto* by

¹ In re Grover's Estate, 84 N. Y. Supp. 474, 12 Misc. R. 629; Hill v. Brown, 6 Reports, 440, App. Cases (1894), 125.

² Attorney-General v. Wiltseere, 16 Sim. 36.

³ Brawley v. Collins, 88 N. C. (1883), 605, 607.

⁴ Howe's Appeal, 126 Pa. St. 233, 237.

⁵ Post, § 307.

⁶ Howland v. Howland, 100 Mass. (1868), 222, 223.

⁷ Fry v. Shipley, 29 S. W. R. 6, 94 Tenn. 252 ("loose property"); Taubenham v. Dunz, 125 Ill. 524, 17 N. E. Rep. 456 ("all other property of every kind"); Harkness v. Harkey, 91 N. C. 195; Hurdle v. Outlaw, 2 Jones' Eq. (N. C.) 75.

⁸ Hurdle v. Outlaw, 2 Jones' Eq. (N. C.) 75; Adams v. Jones, 6 Jones' (N. C.) Eq. 221.

⁹ Tindall v. Tindall, 24 N. J. Eq. 512.

the payment of a portion of the interest and property to the testator prior to his death.¹

Under the general rule parol evidence is not admissible to confine the meaning of the word "property" to any particular species of property.² But the court has the right to place itself in the position of the testator, to acquaint itself with his circumstances, and to be informed what property he has, and what was its situation at the date of the execution of the will.³

For among persons who are not familiar with legal phraseology, the word "property" is ordinarily used to signify the tangible things with which they are brought in contact in their daily avocations. Thus, a farmer speaking of his property would mean his farm, the crops growing upon it, or the stock, wagons, or agricultural implements which are employed by him in its cultivation. A mechanic would mean his tools of trade, and a merchant his stock of goods. For this reason the circumstances, the education and the calling of the testator, and the character of the property which he has disposed of, must be taken into consideration in determining what he meant by using the word "property" when it is not qualified by a context clearly pointing out his meaning.⁴

§ 298. *Tenements defnued.*—This word, says Blackstone, is of a more extensive meaning than the word "land." While it is popularly used to signify houses and buildings, in its original and legal sense it signifies everything which may be holden which is of a permanent nature, whether it be substantial and

¹ *Aydlett v. Small*, 115 N. C. 1 (1894), 20 S. E. R. 163.

² *Baker's Appeal*, 115 Pa. St. 590, 594.

³ *Post*, §§ 909-914.

⁴ *Jameson's Will*, 1 Mich. (1843), 99, 102; *Patterson v. Wilson*, 101 N. C. 584, 8 S. E. R. 229. A testator, who was a farmer, gave A. his farm "*with all the personal property upon said farm, including all the personal property in the house and in the other buildings on said premises.*" The court, after taking into consideration that the legatee had helped the testator on the farm, thought it was quite

natural that, in giving him the farm, he should also give him the farming implements, stock and household furniture which would enable him to cultivate it. But the gift did not pass certificates of stock, promissory notes, etc., which were *in a safe in the house*, and which, in value, amounted to about one-third of the testator's estate, where no reason appeared for giving them to A., and where, if they passed under the residuary clause, an equal distribution among the next of kin would be effected. *Ball v. Dickson*, 83 Hun, 344, 31 N. Y. Supp. 990.

tangible, or unsubstantial and intangible.¹ It will include all sorts of real property, corporeal and incorporeal; not only lands, but leases and other interests in land.

In modern times the word "tenement" is often used to designate an inferior dwelling-house, which is let to several families, each occupying a separate part of the house distinct from the others; or it may mean the apartment which each person occupies in such a house as distinct from the whole house. Used in this modern sense as indicating a dwelling-house, it has been thus defined: "A building, the different rooms or parts of which are let for residence purposes by the possessors to others as distinct tenements, so that each tenant, as to the room or rooms occupied by him, sustains to the common landlord the same relation that the tenant occupying a whole house does to his landlord."²

§ 299. What may be included in the devise of a messuage. Anciently the word "messuage" was synonymous with the word "house," including usually the orchard, garden and everything in the curtilage of the house which was customarily used with it.³ Despite the early cases which sustain the rule that the garden or orchard belonging to a house, though not adjoining, would pass under the devise of a messuage,⁴ it is probable that at the present day this would not be the rule. Indeed, on the peculiar words of the will, the word "messuage" was regarded as exactly synonymous with tenement,⁵ and was confined in its application to the house and the land within its circuit, to the exclusion of outlying lands or gardens.⁶ At the present day, although the word is not very frequently used in wills, it would probably, if used in its ordinary sense, be confined to the house

¹ Co. Lit. 6a, 19b, 20a, 154a; Corn v. Hersey, 144 Mass. 297; Sacket v. Wheaton, 17 Pick. (Mass.) 105, 107; Musgrave v. Sherwood, 23 Hun (N.Y.), 674; Boyd v. Kerwin, 15 N. Y. S. 721; Oskaloosa Water Co. v. Board of Equalization (Iowa), 51 N. W. R. 18; 2 Bl. Com. 16, 17, 59. See also 3 Kent, 401.

² Rose v. King (Ohio St.), 30 N. E. R. 267. Offices, rents, rights of common and advowsons are tenements. Co. Lit. 6; 2 Black. Com. 16.

³ Anderson's Law Dictionary. Coke says that an acre or more may pass by the name of house, and would likely pass by the devise of a messuage. Co. Lit. 56.

⁴ See Carden v. Tucker, Cro. El. 89, 8 Leon. 214, pl. 283; Nicholas v. Chamberlain, Cro. Jac. 121; Thomas v. Lane, 2 Ch. Cas. 26; Hearn v. Allen, Cro. Car. 57, Litt. Rep. 5, Plowden, 85, 86, and 170.

⁵ See ante, § 298.

⁶ Moore, 24, pl. 82.

and the land on which it stands, and perhaps a garden or orchard adjacent though not contiguous; but it certainly would not pass any land which was very far away.¹

§ 300. **Meaning of the word "premises."**—In its primary and technical meaning this word means something that goes before or precedes;² but as it is employed in wills and conveyances, it means a separate portion or parcel of land with all buildings, tenements and other appurtenances on it. This is its meaning in the absence of anything in the will to show that it is used in any other than its ordinary sense. But the circumstances of the testator may show that he used it either in a restricted or in an enlarged sense. If the testator has used it to describe a dwelling-house, it would include not only the garden or land adjacent, with its stables, barns and out-houses, but whatever else was permanently annexed to the land devised.³

§ 301. **Land and its appurtenances.**—In strictness of language land cannot be described as appurtenant to land, *i. e.*, to a house or to other land.⁴ For anything to be appurtenant to land it must be of a different nature from the land, though capable of being used with it. Thus, an easement or servitude or other collateral incident belonging to the land⁵ is technically the only thing that can be appurtenant to it. And the law, in the absence of a controlling context, will assume that the testator used the term in its technical sense.⁶

But the testator may have indicated that he intended to include in the word "appurtenances" whatever is essential to the convenient enjoyment of the land with which it is devised.

¹ *Roe d. Walker v. Walker*, 3 Bos. Willetts, 7 Com. Bench, 709; *Ross v. & Pul.* 375. The word "close" in common usage means an inclosed field either of arable or pasture land, irrespective of the number of acres it contains. Technically it means the particular estate of a person in a piece of land, whether inclosed or not. Doct. & Stud., 30.

² *Black. Com.*, p. 298.

³ *Bowers v. Pomeroy*, 21 Ohio St. (1871), 190; *Sanford v. Irby*, 4 L. J. Ch. (O. S.) 23; *Doe d. Bailey v. Sloggett*, 5 Exch. 107; *Doe d. Heming v.*

⁴ *Plowd.* 169a, 170; *Co. Lit.* 121b; 8 B. & Cr. 141; *Lester v. Pickford*, 84 Beav. 576; *Yates v. Clincard*, Cro. El. 704.

⁵ 2 *Black. Com.*, p. 36.

⁶ *Harris v. Elliott*, 10 Pet. (35 U. S.) 54; *Linthicum v. Ray*, 9 Wall. (76 U. S., 1869), 241; *Eliot v. Carter*, 12 Pick. (Mass.) 436.

Thus it has been held that a devise of *my house* "with all the appurtenances" will include a stable occupied by the tenant of the house,¹ orchard and pasture lands in the case of "a farm and its appurtenances,"² a private right of way,³ or a right to use a stream,⁴ and whatever is necessary for the proper use of a mill.⁵ The meaning of the word depends wholly upon the circumstances of each case. It will be held to pass land, the possession and enjoyment of which are necessary to a proper enjoyment of a house⁶ given, particularly if it is then actually occupied by the person who is in the occupation of the house.⁷

§ 302. Definition and signification of the word "house."

A devise of a house simply, without explanatory words, passes everything within the curtilage of the house, including fixtures, which are to be regarded as real property.⁸ A devise of a

¹ *Otis v. Smith*, 9 Pick. (26 Mass., 1830), 293.

² *Buck d. Whalley v. Nurton*, 1 Bos. & Pul. 53; *Jackson v. White*, 8 Johns. (N. Y.) 59.

³ *Leonard v. White*, 7 Mass. (1811), 6.

⁴ *Wetmore v. Peck*, 66 How. Pr. 54.

⁵ *Blaine v. Chambers*, 1 S. & R. (Pa., 1815), 169; *Piper's Appeal*, 73 Pa. St. 112; *Whitney v. Olney*, 8 Mass. (1807), 280.

⁶ *Hobson v. Blackburn*, *infra*.

⁷ *Myers v. Norman*, 46 S. W. R. 214; *Boocher v. Sanford*, Cro. Eliz. 113; *Hobson v. Blackburn*, 1 My. & K. 571; *Doe d. Lempriere v. Martin*, 2 W. Bl. 1148, where a devise of copyhold messuages and the appurtenances was held to include land formerly occupied by cottages which the testator had torn down and added to his courtyard, though his interest in the two pieces of land were wholly different. An obvious distinction exists between a devise of land *with its appurtenances*, and a devise of a house or farm and the *lands appertaining thereto*. The testator under the latter terms clearly intended to pass *some* lands, and the only question that arises is what land is appertaining to the house or farm devised.

In an early case it was held that "*lands appertaining thereto*," in connection with the devise of a messuage, meant lands usually occupied with it and lying either adjacent to or near it. *Hill v. Grange*, Plow. 170a; *Hearn v. Allen*, Cro. Car. 57. If an easement, such as a private way, has been created by grant and is not appurtenant to land, it would certainly not pass by a devise of the land and appurtenances *unless absolutely essential to a proper enjoyment of the land by the devisee*. Independently of express terms, a mere way by grant expires with the grantee. But a private right of way existing of necessity, being indispensable to the proper enjoyment of the land to which it is appurtenant, would of course pass with it.

⁸ *Mitchell v. Walker*, 17 B. Mon. (Ky.), 66, 67; *Cleverly v. Cleverly*, 124 Mass. 314, 317; *Brown v. Turner*, 118 Mo. 27, 20 S. W. R. 661; *Inhabitants v. Bruch*, 37 N. J. Eq. 482, 485; *Lanning v. Sisters*, 35 N. J. Eq. 392, 404; *Bennett v. Bittle*, 4 Rawle (Pa., 1834), 339; *Rogers v. Smith*, 4 Pa. St. (1846), 98; *Steele v. Midland Rail Co.*, L. R. 1 Ch. 275.

house would certainly include the fee of the land upon which it stood if the fee was owned by the testator. And though land usually cannot¹ be considered as appurtenant to land, a garden, orchard or lawn, or a small piece of land cultivated in connection with the occupation of the house,² and stables or out-houses and the land on which they are built, if they have been habitually used by the testator in connection with the house, would go with it.³ The word "house," of course, is uncertain in its meaning, and just what shall pass depends on the circumstances of each case. The most material of these circumstances are the use and occupation which were made of the house by the testator or other tenant. The devisee of the house has a right to claim whatever has been customarily used in connection with it by the occupant, and which tends to render it a convenient and agreeable place of abode or business.⁴ He may certainly claim all fixtures permanently annexed to the freehold; and the right to use and occupy a house implies a right to use a way or other easement which is appurtenant thereto.⁵

§ 303. The meaning of the word "farm."—Blackstone⁶ points out that the word "farm" originally signified merely provisions. It was the rent which the occupant of land paid

¹ *Ante*, § 301.

² *Smith v. Martin*, 2 Saunders, 400, note 2; *Hill v. Grange*, Plowd. 170, A.; *Plowden*, 85, 86; *Blackborn v. Edgley*, 1 Peere Wms. 600, 2 Eq. Cas. Ab. 324.

³ *Clements v. Collins*, 2 T. R. 498; *Bridge v. Bridge*, 146 Mass. 373, 15 N. E. R. 889. See also *Lanning v. Sisters*, *supra*; *Holme v. Harrison*, 2 Whart. (Pa., 1836), 283, 285; and *cf.* *Upington v. Pooler*, 19 N. Y. Supp. 428.

⁴ Thus, a devise of a malting office with two adjoining cottages, and the garden, and offices *thereto belonging*, includes a malt-house garden. *Doane v. Sheffield*, 71 L. T. 292. In *Doe v. Collins*, 2 T. R. 498, a coal-pen on the other side of the road opposite to a house was held to pass with the conveyance of the house.

⁵ *Bangs v. Parker*, 71 Me. 458. In the case of *Lombe v. Stoughton*, 18 L. J. Ch. 400, the testator directed a mansion-house and suitable offices to be erected fit for the ownership of his estate, which produced an income of £15,000 per annum. The vice-chancellor, in construing the word "mansion-house," said that it would be absurd to say the testator intended to give merely the house without any of the customary appurtenances in the way of pleasure grounds which render a mansion-house an agreeable place of abode. He decreed that there must be proper accommodations in the way of gardens and grounds, and a pretty approach and gateway.

⁶ 2 Commentaries, p. 318.

to the landlord in grain, cattle, or the like, in ancient times, when the employment of money was much less frequent than at present. Gradually, as the custom of paying rent in the produce of the soil ceased to obtain, the word, which had originally been applicable to the rent, was applied to the land, so that the word "farm" signified the estate or land held by the tenant upon rent.

There is nothing in the word itself, either in its primary or modified meaning, which indicates the quantity of land. In England its use is restricted to land occupied for the purpose of cultivation, whether wholly or in part. It will include not only land plowed and planted, but meadows, pasture lands, woods and common.¹ In the United States the word "farm"² usually signifies any considerable tract or piece of land, or a number of small tracts, usually in the ownership of one person, and devoted partially or wholly to agricultural purposes, as to raising crops of grain or vegetables, or to pasturage, but not necessarily in the occupation of or under the actual control and management of the owner himself.³

Whether under a devise of a farm various outlying tracts of land not touching one another are to be included, depends upon the intention of the testator gathered from the whole will. If several *adjacent*, though not *contiguous*, tracts of land are owned or occupied by the testator, and are together cultivated by or for him as part of one farm, they would probably pass under a devise of his farm.⁴ Parol evidence is always admissible to

¹ Preston, Shep. Touch. 93; 4 Cruise, 260; Co. Litt. 59; Doe d. Belasye v. Lucan, 9 East, 448.

² In the Southern States the word "plantation," and in the West the word "ranch," are nearly, though not quite, synonymous in meaning.

³ Kendall v. Miller, 47 How. Pr. (N. Y.) 446; Taylor v. Mixter, 11 Pick. (28 Mass.) 347; Aldrich v. Gaskill, 10 Cush. (64 Mass., 1852), 155, 158; Black v. Hill, 32 Ohio St. 317, 318. A farm may be of any size according to the circumstances. It may comprise any number of acres, and may consist of one compact field, or of several fields more or less adjacent to one another;

it may consist of one quarter-section or less, or of several quarter-sections together; its limits are in no sense controlled by political boundaries; the farm may lie in one township or in several. Rodgers v. Caldwell (Ill., 1892), 32 N. E. R. 691, 693.

⁴ Bradshaw v. Ellis, 2 Dev. & Bat. Eq. (22 N. C.) 20; Garrison v. Garrison, 29 N. J. Law, 153; Allen v. Richards, 5 Pick. 512; Aldrich v. Gaskill, 10 Cush. (Mass.) 155, 158; Gafney v. Kenison, 64 N. H. 354, 10 Atl. R. 706. Tracts of land as much as a half mile apart have been included in a devise of a "plantation," where they were occupied and cultivated as one plan-

show what land is comprised in the term. The declarations of the testator and of others, in speaking of the land, showing how it was customarily described, may be received.¹

§ 304. The meaning of "homestead."—The word in its popular sense signifies the usual residence of the testator and his family. If in town, the dwelling-house with the customary appurtenances which render it habitable is meant. If in the country, the term will include the dwelling-house of the testator and land which has been cultivated by the occupant strictly in connection with it, as well as all convenient barns, stables and other outbuildings of every sort necessary or convenient for the proper occupancy of the dwelling-house by a family.² But the word, though used in connection with rural property,

tation by the owner. *Harvey v. Harvey*, 72 N. C. 570, 574; *Bradshaw v. Ellis*, 2 Dev. & Bat. (N. C.) Eq. 20.

¹ No property not on a farm is embraced in a gift of "my home farm, together with all appurtenances, fixtures, goods and chattels remaining upon said farm and belonging to my estate." In *re Schmidt's Estate*, 38 Atl. R. (Pa., 1898), 1086, 1087. In this connection it may be well to consider the meaning of the words "adjacent," "adjoining" and "contiguous." "Adjacent" signifies lying near, close to, in the neighborhood; "adjoining" properly means touching in part, while "contiguous" means touching wholly along one side. In *re Ward*, 52 N. Y. (1873), 897; *Miller v. Mann*, 55 Vt. 479; *Akers v. U. R. Co.*, 43 N. J. L. 110, 113. Mr. Crabbe, in his work on Synonyms, thus distinguishing these words: "That which is *adjacent* may be separated by the intervention of some third object, as, for example, in the sentence 'They have been beating up for volunteers at York and the towns adjacent, but no one will enlist.' What is *adjoining* must touch in some part of it, as, for example, in the sentence 'As he happens to have no estate adjoining mine equal to his own, his oppressions are often borne without resist-

ance.' Things which are *contiguous* must touch entirely on one side. Lands are *adjacent* to a town. Fields are *adjoining* to each other, while houses are contiguous to each other." So in the case of *Josh v. Josh*, 5 C. B. (N. S.) 454, the word "adjoining" in the description of land includes several fields, each situated one beyond the other, which, together with the house and the land immediately adjacent, formed the testator's farm. Here the word "adjoining" was not limited to a single field which was literally next to the house. A description by metes and bounds, where the testator has lands answering to such description, will always prevail over a description of land as adjacent to other land, which is incorrect. *Wales v. Templeton*, 47 N. W. R. 238, 83 Mich. 177, 181.

² *Kennedy v. Kennedy*, 105 Ill. 350; *Hopkins v. Grimes*, 14 Iowa, 73 (1862); *Gregg v. Bostwick*, 83 Cal. 227; *Delany's Estate*, 87 Cal. (1869), 179; In *re Blackmer's Estate*, 66 Vt. 46, 28 Atl. R. 419; *Backus v. Chapman*, 111 Mass. 386; *Chace v. Gregg* (Tex.), 31 S. W. R. 76; *Kilburn v. Dodd*, 80 Atl. R. 868; *Drew v. Drew*, 28 N. H. 489; *Moore v. Powell*, 95 Va. 258, 28 S. E. R. 172.

is not precisely synonymous with the word "farm." It will include only the land which is about and contiguous to the dwelling-house as distinct from outlying tracts,¹ as land laid out in town lots² which might pass by a devise of a farm.³

Parol evidence is always admissible to show what was included in the term, and to show⁴ that a farm had always been known as the "*old homestead*."⁵

§ 305. Property described as in the occupancy of the testator.—A devise of real property as a house and farm described by the testator as "*now occupied by me*," or "*where I now live or reside*," will include all land actually used as a farm or residence, occupied by him and in his control at the date of the execution of the will;⁶ but not land held under him by tenants.⁷ It is not material that the farm or land described as that on which the testator lives, or which he occupies, consists of several separate tracts, provided all of them are at one time in the occupancy of the testator and constitute together one farm.⁸

¹ *Thatcher v. Howland*, 2 Met. (43 Mass.) 41, 44; *Melcher v. Chase*, 105 Mass. 125, 128; *Barnard v. Martin*, 5 N. H. 536; *Woodman v. Lane*, 7 N. H. (1835), 536; and *cf. Kanouse v. Stockbower*, 48 N. J. Eq. 42, 21 Atl. R. 197.

² *Hampton v. Cowles*, 4 Dev. & B. (N. C., 1839), L. 16.

³ See § 302.

⁴ *Post*, §§ 911, 913, 914.

⁵ *Waugh v. Waugh*, 28 N. Y. 94. Thus, a devise of "*my home place where I now live*" will include only the house *actually occupied by the testator at the time of making the will*, with the yard and outbuildings inclosed by a fence and the right of way to the same, but not other buildings, though located on the same lot as the home place and rented to tenants. *McKeough v. McKeough*, 69 Vt. 34, 39, 37 Atl. R. 275; *Waggoner v. Ball*, 95 N. C. 323.

⁶ See *ante*, § 15.

⁷ *Jackson v. Sill*, 11 Johns. (N. Y.) 201, 202; *Brown v. Saltonstall*, 8 Met. (44 Mass.) 423, 427; *Jackson v. Moyer*,

18 Johns. (N. Y.) 531; *Allen v. Richards*, 5 Pick. 512, 514; *Perkins v. Jewitt*, 11 Allen (93 Mass.), 9; *Doe v. Parkin*, 5 Taunt. 321 ("house in my occupation"); *Seal v. Taylor* (1894), 1 Ch. 316. "My home place where I now live," in a devise, comprises only the house actually occupied by the testator, with a yard and outbuildings inclosed by a fence with the house, with the privilege of a right of way to reach same. The testator owned a lot occupied by other buildings, in the corner of which the home was located. *McKeough's Estate v. McKeough*, 37 Atl. R. 275, 69 Vt. 34, 39. See also *ante*, §§ 299-302.

⁸ *Aldrich v. Gaskill*, 10 Cush. 155; *Phillipsburgh v. Bruch*, 37 N. J. Eq. 482, 485; *Kendall v. Miller*, 47 How. Pr. 446; *Coleman v. Eberly*, 76 Pa. St. 197; *Piper's Appeal*, 73 Pa. St. 112. But a gift of "*a farm where I live*" will not include a wood lot separated from it, and over half a mile away. *Allen v. Richards*, 5 Pick. 512, 514; *Brendlinger v. Brendlinger*, 26 Pa.

It may be of value, in construing language referring to the occupancy of real property, to consider the fact that the nature of the acts which constitute occupancy differs according to the character of the real property which is the subject of occupancy. A dwelling-house is in the occupation of a person when he resides in it and uses it as a place of abode for himself and his family. A store or a factory is occupied when it is used for commercial or manufacturing purposes; while a barn or a stable may be occupied either by its use as a place for the stalling of horses and cattle, or for the deposit and safe-keeping of grain, agricultural implements, etc. A dwelling-house is not unoccupied merely because the occupant may absent himself from it for an indefinite period, if he continues to recognize it as a permanent place of residence, and if he intends to return to it when his sojourn elsewhere is terminated.¹

Whether a description of a house, farm or a piece of land by occupancy will prevail over a description by name, or by courses and distances or boundaries, is an open question. In England it seems to be the rule that, so far as a description by occupation or tenure is inconsistent with a description by specific name, or with a description by metes and bounds, the former will be rejected. Thus, in the case of a devise of a farm called A., situated in the parish of D., and in the occupation of B., the court held that a portion of such farm would pass, though not in fact actually occupied by B.² On the other hand, in con-

St. 131. In England, where a testator devised the "Anchor Inn, where I now reside," the court held that a portion of the said inn which, at the date of executing the will, was in process of being separated from the balance, and which was afterwards leased by the owner to be occupied as a shop, while the testator continued to occupy the inn as his residence and place of business, would pass. In *re Edwards*, 63 L. T. 481. The rule that the will speaks as of the death of the testator is subject to an exception where he describes lands devised as *now* occupied by him; but there may be indications of an intention that he intended,

though using the words in the present tense in describing the occupation of the land, to include land subsequently purchased, and, if so, *that* land will pass. In *re Champion*, 2 Rep. 162 (1893), 62 L. J. Ch. 372, 67 L. T. 694. A devise of the farm where *I now live* would include a right of way over adjoining property, if the right of way is absolutely indispensable to the convenient enjoyment and occupancy of the farm.

¹ *Ante*, § 31.

² *Goodtitle d. Radford v. Southern*, 1 Maule & Sel. 299, 301; *Hall v. Fisher*, 1 Collyer, 47; *Blague v. Gold*, Cro. Car. 447, 473; *Chamberlain v. Turner*, Cro. Car. 129; *Thompson v. Tonson*,

struing a description of land in general terms, as the "land I occupy" or that "upon which I now live," the court has permitted the general description to prevail over the description by courses and distances where the two were inconsistent.¹

The rule is, where the testator devises land which he describes as derived or purchased from a certain person, to refer to the deed, will or other instrument of conveyance in order to ascertain what land passes. These writings are always admissible as parol evidence.² In addition, the general rule that words are to be taken in their ordinary and technical sense is applicable to a devise of land described as *occupied* by A., or *purchased* from A., or *derived* from A. Thus, a devise of land which the testator has purchased will include that which he has taken in exchange as well as that for which money has been paid.³ Land described as that which the testator became entitled to on the decease of his father means only land which he took by descent, and not land which the father conveyed to him during his life.⁴

§ 306. Definition and disposition of emblements.—Emblements are corn and other crops of the earth which are produced annually, not spontaneously, but by labor and industry,

2 Leon. 129. But compare *Press v. Parker*, 10 T. B. Mon. (Ky.) 158, 163. located elsewhere. *Doe d. Tyrrell v. Lyford*, 4 Maule & Sel. 550. And *eo*

¹ *Thomson v. Thomson*, 21 S. W. R. 1085, 1128, 115 Mo. 56. But compare *contra*, *Oggsbury v. Oggsbury*, 115 N. Y. 290, 22 N. E. R. 2, where the devise was to A. "of all that land that he has a quitclaim deed of me, and which he *now occupies*," and A. claimed a parcel of land which the testator had permitted him to occupy during his life, but which was not included in the description of the quitclaim deed. For a case in which the court held that the words "occupies" and "resides" are synonymous as applied to a devise of a farm, see *Chace v. Lamphere*, 4 N. Y. S. 288, 51 Hun, 524.

² See *ante*, § 279.

³ *Doe d. Meyrick v. Meyrick*, 1 Cr. & M. 820. A devise of lands located at X, *purchased* of A., will not include lands purchased of him but

⁴ *Roe d. Ryall v. Bell*, 8 T. R. 579. And a devise of real estate *derived from* A. does not include land which was bought in by the testator under the foreclosure of a mortgage which had been bequeathed to him by A. *Coles v. Coles* (N. J., 1897), 37 Atl. R. 1025. A devise of a farm occupied by the testator and devised or conveyed to him by A. comprises all the land in his occupation, though part of it was not conveyed to him by A. *Drew v. Drew*, 28 N. H. 489; *Barnard v. Martin*, 5 N. H. 536.

and for this reason are called *fructus industriales*.¹ They are chattel interests, which go to the executor as against the heir of the testator, but not usually as against the devisee of the land on which they are growing at the death of the testator.² As between the devisee of the land and the executor the matter is one wholly of intention. If there is no clear evidence of an intention in the will that the testator intended emblements to go to the executor, they will pass with the land devised, upon the theory that the testator would not have given land away from his heir without also giving those things which would make it more valuable to the devisee.³ This presumption in favor of the devisee is rebuttable by showing an express or implied specific gift of the emblements to some one else, though not by a mere residuary clause.⁴ Thus, a gift of "stock on the farm, whether alive or dead," carries growing crops as against the devisee,⁵ though a later case has held that a legacy of "farm stock, goods, chattels and effects" will not pass crops growing at the death of the testator on land owned by him, but that they will go to the devisee of that land.⁶ In the case of growing

¹ *Reiff v. Reiff*, 64 Pa. St. 154, 157. Among emblements may be included wheat, corn and grain of every kind; hops, hemp and flax; fruits which are planted annually, and potatoes. 2 Black. Com., p. 118.

² *Thornton v. Burch*, 20 Ga. 791, 792; *Evans v. Iglehart*, 6 Gill & J. (Md.) 171, 188; *Stall v. Wilbur*, 77 N. Y. 158; *In re Chamberlain*, 35 N. E. R. 602, 140 N. Y. 390; *In re Mack's Estate*, 35 N. Y. S. 109, 13 Misc. R. 368.

³ *Cooper v. Woolfit*, 2 Hurl. & N. 122; *Bradner v. Franklin*, 34 N. Y. (1866), 347, 349; *Rough v. Womer*, 76 Mich. 375, 43 N. W. R. 573; *Wilkins v. Vashbinder*, 7 Watts (Pa.), 378; *Bank v. Wise*, 3 Watts (Pa., 1834), 394; *Cobel v. Cobel*, 8 Pa. St. 342, 346; *Johnson v. Smith*, 3 Pa. St. (1848), 471; *Dennett v. Hopkinson*, 63 Me. 350; *Hathorn v. Eaton*, 70 Me. 219; *Dunford v. Jackson* (Va., 1896), 22 S. E. R. 853; *Shofner v. Shofner*, 5 Sneed, 91. *Contra*, *Humphrey v. Merritt*, 51 Ind. 197, 200.

⁴ *Cleman's Estate*, 9 N. Y. S. 474.

"Wheat or corn on hand" takes in only grain in barns and not standing crops. *Adams v. Jones*, 6 Jones' Eq. (N. C.) 221.

⁵ *Vaisey v. Reynolds*, 5 Russ. 12, 19; *Blake v. Gibbs*, 5 Russ. 13; *Cox v. Godsalve*, 6 East, 604; *West v. Moore*, 8 East, 339, 343; *Rudge v. Winnall*, 12 Beav. 357, 360.

⁶ *In re Roose*, L. R. 17 Ch. D. 696, 29 W. R. 230, 50 L. J. Ch. 197, 43 L. T. 719. In some states it is by statute enacted that crops growing on the lands of the deceased shall be assets in the hands of the personal representative, to be distributed as part of the personal estate. Such a statute does not alter the character of growing crops, except so far as it makes them primarily liable as personal assets to pay debts; nor does it change the rule that they go to the devisee of the land in the absence of an intention to the contrary. They will be regarded as a specific legacy to the devisee of the land, and should be

grass, hay, clover and fruit, etc., even though raised from seed, if not cultivated, or if growing spontaneously, the rule is otherwise. The proceeds of a sale of grass, which, at the death of the testator, was growing on his farm and which is not emblements, passes as a part of the farm to the devisee of the farm, and not to the executor for the benefit of legatees.¹ Timber, whether growing spontaneously or from small trees set out, is always a part of the land itself and passes to the devisee of the land.

§ 307. The doctrine of *ejusdem generis*.—Where the testator in describing property employs a general clause, and with it, either preceding or following it, enumerates particular articles of property by specific description, the effect of the general description of property will be restrained to include only such articles as are of the same kind or nature as those specifically enumerated.² Thus, where the gift was of “books, pictures and ornaments,” it was held that jewelry was included in the term “ornaments.”³ But where the testator gave *all his property*, consisting of bonds, mortgages, ground rents, stocks and personal effects, the court considered that he did not intend to pass real estate which was not *ejusdem generis*.⁴ But generally comprehensive terms of property ought to receive their full operation (unless clearly modified by the context), particularly where to apply the rule *ejusdem generis* would produce a partial intestacy because of the absence of a residuary clause. Thus, where the bequest was of “*movable goods*,” etc.,⁵

delivered to him by the executor in case they are not needed to pay debts.

¹ In *re Chamberlain*, 35 N. E. R. 602, 140 N. Y. 390; *Kain v. Fisher*, 6 N. Y. (1852), 597; *Evans v. Roberts*, 5 Barn. & Cres. 820. See also *Craddock v. Riddlesbargar*, 2 Dana (Ky.), 205, 206; *Mitchell v. Billingsley*, 17 Ala. 391, 393; *Green v. Armstrong*, 1 Denio (N. Y.), 550, 554.

² In *re Traylor's Estate*, 75 Cal. 189, 16 Pac. R. 774; *Andrews v. Schoppe*, 84 Me. 170, 24 Atl. R. 805; *Dole v. Johnson*, 3 Allen (Mass.), 364; *Browne v. Cogswell*, 5 Allen (Mass.), 556; *Johnson v. Goss*, 128 Mass. 434; *Farish v. Cook*, 78 Mo. 212; In *re Reynolds*,

124 N. Y. (1891), 397; *Frashear v. Alexander*, 2 Dev. Eq. (17 N. C.) 348; *Pipper v. Ellison*, 12 Ired. (34 N. C.) L. 61; *Hurdle v. Outlaw*, 2 Jones' (N. C.) Eq. 75; *Sparks' Appeal*, 89 Pa. St. 148; *Rawlings v. Jennings*, 13 Ves. 39, 45; *Hotham v. Sutton*, 15 Ves. 319; *Cook v. Oakley*, 1 P. W. 302; *Collier v. Squire*, 3 Russ. 467; *Wrench v. Jutting*, 3 Beav. 321; *Crichton v. Symes*, 3 Atk. 61; *Traford v. Berrige*, 1 Eq. Cas. Ab. 201.

³ In *re Traylor*, 75 Cal. 189, 16 Pac. R. 774.

⁴ *Howe's Appeal*, 126 Pa. St. 233, 24 W. N. C. 133, 17 Atl. R. 588.

⁵ *Swinfen v. Swinfen*, 29 Beav. 207.

"plate, linen, china, furniture and *effects*,"¹ "furniture, plate, live-stock, and what else I may possess,"² "personal effects, and everything I may have,"³ used in a general or residuary clause, money securities and the like, will be included.⁴

§ 308. **Personal property construed.**—The testator's personal property will include all his property of which he has absolute control, other than real estate, and of which he has power to dispose. The words used in this sense include money, stocks, notes and securities for the payment of money, as well as more tangible articles.⁵ This is the primary sense of the words which they have in a will, unless it is clearly apparent that the testator used them in a restricted sense. In many instances it will be found that the meaning is limited by a restraining context. The principle of *ejusdem generis*⁶ will apply, and the meaning will be cut down. Thus, in the case of

¹ *Michell v. Michell*, 5 Mad. 69.

² *Fleming v. Burrows*, 1 Russ. 276.

³ *In re Scarborough*, 30 L. J. Prob. 85.

⁴ The signification of the term "*et cætera*" depends upon the language of the context. Thus, where it is employed in connection with terms of broad signification, such as money or estate, it may include every description of personal property, and the proceeds of the sale of land, as where the bequest was "all my money, cattle, farming implements, *etc.*," to a wife, she paying legacies. *Chapman v. Chapman*, L. R. 4 Ch. D. 800, 801. So a gift of a "house, *etc.*" was held to include everything in the house. *Twining v. Powell*, 2 Coll. 262, 266. But where the word "*et cætera*" is used in connection with terms describing some particular kind of personal property, it will signify other things "*ejusdem generis*." So, where the gift was of all "my furniture, *etc.*," the court held that shares in corporations would not pass. *Barnaby v. Tassell*, L. R. 11 Eq. 363, 369; *Newman v. Newman*, 26 Beav. 220. It may be noted in this connection that the abbrevia-

tion "*etc.*" is very frequently used, particularly by professional persons, without definite meaning. Though the presumption is that all words in a will have *some meaning*, yet, where it is clear that this term, which is so often used without any, has no particular meaning, it may be rejected as surplusage.

⁵ *Golder v. Chandler*, 87 Me. 63, 70; *Browne v. Cogswell*, 5 Allen (Mass.), 556, 559; *Andrews v. Schoppe*, 84 Me. 170, 172, 24 Atl. R. 805; *Risk's Appeal*, 110 Pa. St. 171 (1885), 1 Atl. R. 85; *Terhune v. Bray*, 16 N. J. L. 53, 54; *Brown v. Dysinger*, 1 Rawle (1829), 408; *Pell v. Ball*, *Speer's Eq.* (S. C., 1844), 48; *Dunford v. Jackman's Executors* (Va., 1896), 22 S. E. R. 853; *In re Prater*, *De Singe v. Beare*, L. R. 37 Ch. D. 481, 489, 57 L. J. Ch. 342, 58 L. T. 784. A pew in a church is personal property by statute. *Holland v. Cruft*, 8 Gray (74 Mass., 1857), 162, 171. "*All my personal property which I may have at my death*" includes the proceeds of real property sold by the testator. *Simmons v. Beazel*, 125 Ind. 362, 365, 25 N. E. R. 344.

⁶ *Ante*, § 307.

a bequest of "household furniture, and personal property in an office,"¹ or "wearing apparel, furniture and personal property of every description, name and nature,"² or "all my house-keeping articles, beds, kitchen and table furnishing, etc., and *all articles of personal property in my house*,"³ or "all my personal property, household effects, horses and carriage, mortgages, etc.,"⁴ the words "personal property" were held to pass only such articles as are of a character similar to that mentioned, and not to include notes, money, stocks, securities, and other choses in action.

§ 309. The operation of the word "effects" — Whether real estate passes by it. — The word "effects," though a word of extensive application, has reference primarily to the personal property of the testator; and, as it is ordinarily employed, will carry such property only, unless a very clear indication of the intention of the testator is found in the context that it shall also pass real property. This term, standing alone, and not restricted by anything in the context, will include all the personal property of the testator.⁵ But its meaning may, of course, be limited by its employment with words indicating some particular sort of personal property, as in the case of a gift of "household furniture, books, plate and *other effects*," in

¹ In re Reynolds, 124 N. Y. 388, 395, 26 N. E. R. 954. See also Kelly v. Richardson, 100 Ala. 584, 601, 13 S. R. 785. To the same effect, Kenyon v. Reynolds, 6 Dem. Sur. (N. Y.) 299 ("all furniture and personal property in or upon the same)."

² Bills v. Patterson, 64 N. H. 554, 561; Dole v. Johnson, 3 Allen (Mass.), 364, 366.

³ Andrews v. Schoppe, 24 Atl. R. 805, 84 Me. 170.

⁴ Johnson v. Grass, 128 Mass. 433.

⁵ Martin v. Osborne, 1 Pickle (Tenn., 1886), 420, 3 S. W. R. 647; Miner's Will, 146 N. Y. 121, 40 N. E. R. 788; In re Price's Estate, 32 Atl. R. 45, 51, 169 Pa. St. 294, 298; In re Reimers' Estate, 159 Pa. St. 212, 28 Atl. R. 186; Bradford v. Bradford, 6 Whart. (Pa.) 236, 244 (1840); Howe's Appeal, 126

Pa. St. 233, 24 W. N. C. 133, 17 Atl. R. 588; Dowdell v. Hamm, 2 Watts (Pa.), 61, 65; Ennis v. Smith, 14 How. (U. S., 1852), 400, 402; Bland v. Lamb, 2 J. & W. 399, 409; Campbell v. Prescott, 15 Ves. 500, 503 ("all my effects whatsoever"); In Goods of Shephard, 41 L. T. 530; Michel v. Michel, 5 Mad. 69; Camfield v. Gilbert, 3 East (1803), 516, 524; Hotham v. Sutton, 15 Ves. 319; Doe v. Dring, 2 Maule & Sel. 454. Lord Mansfield in 1774 construed the word "effects" as synonymous with "worldly substance," which, of course, includes everything which can be turned to value and hence a devise of all real and personal effects comprises all the estate. Hogan v. Jackson, 1 Cowper, 304.

which case the rule *ejusdem generis*¹ will apply, and the word "effects" will have a limited signification.²

The word "effects," though primarily signifying the personal property exclusively, may, according to the context in which it is found, be construed to carry the real estate of the testator. Thus, in a recent case, where the testator "devised and bequeathed" to his wife all his furniture, goods, chattels and effects, of whatsoever nature the same may be, and wheresoever the same may be situate," the court held that his real property passed.³

So where the testator, after directing the payment of his debts, and bequeathing his books and a small annuity, which was to be payable out of the real and personal estate, gave and bequeathed all "the residue of his goods and chattels, *personal estate and effects of what nature and kind soever*," to trustees to be sold after the death of a life tenant and the proceeds to be paid to a person mentioned, the court held that the trustees took the real property.⁴

¹ *Ante*, § 307.

² In *Lippencott's Estate*, 34 Atl. R. 58, 175 Pa. St. 368, the words "personal effects" were held *not* to include personal property in the residence of the testator, such as furniture and pictures. And a gift of "household furniture and effects of what nature or kind soever" is confined to articles assimilating to those particularly specified, and does not include the general residue of the personal estate. *Rawlings v. Jennings* (1806), 13 Ves. 39, 45; *Newman v. Newman*, 26 Beav. 220, 221. *Contra*, in *re Jupp* (1891), Prob. 300, where a gift of "all my furniture, jewelry and other effects" was held to be a gift of the residue of personalty; and *cf.* *Michel v. Michel*, 5 Mad. 69.

³ *Hall v. Hall* (1892), 1 Ch. 361, 3 Ch. 399, 66 L. J. 206. The court relied upon the word "devised." See also note 5, p. 415.

⁴ *Marquess of Titchfield v. Horncastle*, 2 Jur. 610. Lord Langdale,

M. R., in coming to this decision said: "Much has been said in argument as to the meaning of the word 'effects,' which was understood by Lord Mansfield to mean much the same thing as worldly substance, although certainly in subsequent cases the courts have inclined to consider that word in its proper or natural interpretation to be confined to personal estate, unless there are other words in the context to control that meaning. I do not express my opinion on that, although I am not aware of any reason why the word should not be applicable to the 'effects' generally arising from a man's industry, whether consisting of personal or real estate; but it is not necessary to express an opinion on so refined a point of construction. The testator intended that his debts should be paid; and after that was done, that his brother should enjoy what remained of his real and personal property for life; and after his brother's death he did not intend any relation

And the rule that real property may pass under a testamentary disposition of effects is supported by very many other cases. Thus, a devise of effects in the residuary clause was held sufficient to pass land acquired after the execution of the will.¹ And real property was held to pass where the gift was "my stock in trade, money, book debts, and what *other effects* I have;"² or "all the residue of my money, chattels and effects;"³ or "I devise to them and their heirs my effects, of what kind soever I may have at my house in A. or elsewhere, *excepting my lands and effects in J.*"⁴ The verb "devise," when used in connection with a disposition of property in a will under the appellation of "effects," is often permitted to control its meaning, as the word is the technical and appropriate term to use in disposing of real property by will, and is often used to describe a testamentary disposition of real estate. When, therefore, this word is employed by the testator, and it appears that he had real estate at the date of execution, it may be reasonable to assume he intended to dispose of it.⁵

§ 310. Construction of the words "goods" and "chattels."—The phrase "goods and chattels," used in its primary sense, will include only personal property which is tangible, visible and movable.⁶ The words are, or at least originally were, synonymous.⁷ The early writers have pointed out that the latter word is derived from the French, which in turn derived

to have any part of his property, but he did intend that his property should go to the plaintiff. He subjected the whole of his property to the payment of his debts. Then the annuity was to be paid out of the real and personal estate. . . . He gives directions as to his real property. Nothing was to be sold during the life of his brother. His property was realized — perhaps it might be right to say 'effected' — at the time of his death, and he meant it to remain so until his brother's death. See also *Den d. Franklin v. Trout*, 15 East, 394, 399, in which the devise was "all my effects whatsoever and wheresoever which I shall be possessed of or

entitled to at my decease," and this was sufficient to pass real estate.

¹ *Ruckle v. Graffin* (Md.), 39 Atl. R. 624.

² *Milsome v. Long*, 3 Jur. (N. S.) 1078; *Forrest v. Porch*, 100 Tenn. 391, 45 S. W. R. 676.

³ *Smyth v. Smyth*, L. R. 8 Ch. D. 561, 568; *Doe v. Lainchbury*, 11 East, 290; *Page v. Foust*, 89 N. C. 447.

⁴ *Attorney-General v. Bristowe*, 50 L. J. P. C. 15. See also *Hall v. Hall*, L. R. 1 Ch. D. 361, 368; *Doe d. Haw v. Earles*, 15 M. & W. 450, 457; *Doe d. Chilcott v. White*, 1 East, 33, 37.

⁵ *Phillips v. Beal*, 25 Beav. 25, 27.

⁶ *Farish v. Cook*, 78 Mo. 212, 219, 220.

⁷ 2 Black. Com., p. 387.

it from the Latin "*catalla*," which meant, primarily, live-stock that is used in husbandry. From the same word we have derived our word "cattle." Inasmuch as nearly all personal property which could be owned consisted in ancient times of live-stock, the word very anciently acquired the secondary meaning of movables, as distinguished from land held in feudal tenure.¹ In modern times the word "chattels" has been construed to pass not only tangible and movable things, such as cattle, horses and animals of all sorts,² merchandise of various sorts, household furniture, wearing apparel and jewelry, but leases of land,³ timber cut down,⁴ and indeed every species of personal property,⁵ including choses in action. Thus, a gift of "household furniture, books, linen, wearing apparel, and all *other goods and chattels*," which the testator should be possessed of at his death, excepting plate and legacies, includes the whole residue of the personal property.⁶ But these words are particularly susceptible of modification and restriction in their meaning if they are united to words of a more restricted signification contained in the context. Under these circumstances they will lose their primary meaning. The maxim "*noscitur a sociis*" will then be applicable. Hence where the term "goods and chattels,"⁷ or the word "goods" alone,⁸ is employed in connection with household furniture, plate, linen, china, fixtures, and similar terms of restricted meaning, their meaning will be restrained to include articles "*ejusdem generis*," and money, promissory notes, securities and choses in action will not pass. Nor will a bequest of "*household goods, with a pecuniary legacy, and the residue of goods and chattels not hereinbefore mentioned*," pass the proceeds of the sale of real estate which has not been used for the payment of debts.⁹

¹ 2 Black. Com., pp. 385, 386; 2 Kent, 342.

² Gower v. Gower, 2 Eden, 201, Amb. 612.

³ Tilley v. Simpson, 2 T. R. 659, n.

⁴ Hobart, 173.

⁵ Dowdell v. Hamm, 2 Watts (Pa., 1833), 61, 65; Co. Litt. 118a. Timber sold or reserved, though not perhaps cut down, will pass by a gift of chattels. Comyn's Dig., *Biens*; 2 Saund. Index, *Trees*; Bridgm. Index, *Timber*;

Hobart, 173; 11 Co. 50; Toller's Executors, pp. 195, 196.

⁶ Swinfen v. Swinfen, 29 Beav. 207; Bennett v. Bachelor, 3 Bro. C. R. 29, 1 Ves. Jr. 63.

⁷ Peaslee v. Fletcher, 60 Vt. 138, 14 Atl. R. 1.

⁸ Wrench v. Jutting, 3 Beav. 521.

⁹ Foster v. Smith, 156 Mass. 379, 31 N. E. R. 291. So also in Kingsley v. Blackmer, 63 Vt. 236, 22 Atl. R. 600. "Stock in trade" defined. In re

§ 311. **Movables defined.**—The terms “movables” and “immovables” are derived from the Roman civil law, by which all property is divided into *bona movabilia* and *bona immovabilia*. The former, *mobilia quae se movent vel ab aliis moventur*, includes personal property which may be moved from one place to another. Now this capacity of being moved from place to place obviously attaches only to things which are tangible and corporeal, such, for example, as furniture, merchandise, machinery, farming stock and similar personal property. It is not likely that movables would *per se* include promissory notes,¹ judgments² or debts generally.³ But the word “movables” in one case has been permitted to include money.⁴

§ 312. **The meaning of the word “money.”**—A bequest of “my money,” “all moneys,” or “money” *simpliciter*, taking the word in its primary sense, means that only which is strictly such, *i. e.*, either cash on hand or on deposit at the banker’s.⁵

Richardson, 50 L. J. Ch. 488, 44 L. T. 404.

¹ Penniman v. French, 17 Pick. (34 Mass., 1885), 404, 405.

² Strong v. White, 19 Conn. 238, 245.

³ Jackson v. Vanderspiegle, 3 Dall. (2 U. S., 1795), 142; Wood v. George, 6 Dana (Ky.), 343; Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460; Humble v. Humble, 8 A. K. Marsh. (Ky.) 126.

⁴ Wood v. George, 6 Dana (Ky.), 343. And where the testator devised “her movables, plate, jewels, pictures, linen, and £6,000 in South Sea stock,” the court held that movables did not include other stock. Steignes v. Steignes, Moseley R. (Eng.) 296, 297. Cf. Michell v. Michell, 5 Mad. 69.

⁵ Beck v. McGillis, 9 Barb. (N. Y., 1850), 35, 39; Smith v. Burch, 92 N. Y. 228; Smith v. Davis, 1 Grant Cas. (Pa., 1854), 158; Parker v. Marchant, 1 Y. & C. C. 290, 304; Carr’s Estate, 13 Pa. Co. Ct. R. 643; Mann v. Mann, 14 Johns. (N. Y.) 9; Collins v. Collins, L. R. 12 Eq. 455, in which the devise was “the residue of the moneys belonging to my estate.” See also Dab-

ney v. Cottrell, 9 Gratt. (Va., 1858), 572, 581; Paup v. Sylvester, 22 Iowa, 371. Money “I may have on hand remaining at my decease” does not include money on deposit in a distant bank. Hancock v. Lyon (N. H.), 29 Atl. R. 633. The fact that the testator speaks of the money as being “on hand,” “by him,” or in “his possession,” may indicate that he does not refer to debts due him which are still unpaid. Thus, a bequest of “money I may have by me,” and “of any money not disposed of in my name which is to my credit,” following bequests of household furniture and small pecuniary legacies, there being no residuary clause, does not include a sum of \$150,000 which was due the testatrix from the estate of her deceased husband. She is intestate as to that sum. In re Levy’s Estate, 14 Pa. Co. Ct. R. 129, 33 W. N. C. 488, 28 Atl. R. 1069, 161 Pa. St. 189, 194. And see p. 426, notes. The testator who, when the will was executed, owned only personal property, gave some pecuniary legacies, and devised the “remainder

There can be no doubt that a devise of "money" or "ready money" will pass money on deposit in a bank which is subject to the draft of the testator.¹ This is a very common use of the term. We speak of our money at the banker's, meaning thereby what we have deposited with him subject to check, but which is not to be returned *in specie*.²

It is a well known fact that the word "money" is colloquially employed to signify much more than the circulating medium. We speak of a man as worth a great deal of money, or as having lost a large amount of money, when, in fact, the wealth which he possesses or which he has lost consists perhaps wholly of stocks and bonds, and often of real estate alone. In the majority of instances in which the word is employed in wills, the testator, so far as he had any clear understanding of the term, in all probability meant all his personal estate, or at least some other description of personal property than gold, silver and notes on hand or in the bank. In order to ascertain whether the testator employed the word in its restricted or in its enlarged sense, parol evidence is admissible³ to show the circumstances of his estate; and if it shall appear that at the time of the execution of the will in which he disposes of his money he owned very little cash, the conclusion is almost irresistible that he meant to give some portion of his personal property other than cash on hand. So, if it can be ascertained from the context that the testator used the word as synonymous with personal property, his intention must be respected.⁴ Hence, under a bequest of money, government bonds,⁵ promissory notes,⁶ ground rents due and unpaid,⁷ furniture, leasehold estates and

and residue of his money" to a hospital. He subsequently purchased real estate to such an extent that no personalty remained to pay the legacies. The real estate passed under the residuary gift of money to the hospital. *Jacobs' Appeal*, 140 Pa. St. 268, 27 W. N. C. 365, 21 Atl. R. 318.

¹ *Parker v. Marchant*, *supra*; *Vaisey v. Reynolds*, 5 Russ. 12 (ready money); *Manning v. Purcell*, 7 D. M. & G. 55.

² 1 Jur. 401; *Mayne v. Mayne*, 1 Ir. R. 324 (1897).

³ But not the declarations of the testator. *Mann v. Mann*, *supra*.

⁴ *In re Levy*, 161 Pa. St. 189, 194.

⁵ *Hinckley v. Primm*, 41 Ill. App. 579; *Hamilton v. Serra*, 6 Mackey (D. C., 1887), 168. Cf. *Hotham v. Sutton*, 17 Ves. 319.

⁶ *McNeill v. Masterson*, 79 Tex. 670, 15 S. W. R. 673; *Sweet v. Burnett*, 20 N. Y. S. 24.

⁷ *In re Strawbridge*, 18 Pa. Co. Ct. R. 692.

shares in corporations,¹ unsatisfied judgments² and other debts due³ the testator and choses in action have been held to pass.⁴ And the addition of the words "other personal property" to the word "money" is conclusive evidence that the testator intended the word to apply to other property than cash or securities.⁵ But a gift of money will not ordinarily pass the real estate.⁶

The question of the meaning of the word "money" often arises where it is used by the testator to describe his interest in the estate of a deceased person, where the property he takes consists of both real and personal property. A gift of "money due me" will carry a legacy payable to the testator, if the legacy has been acknowledged by the executor of the will under which he takes,⁷ though not if the legacy has not been acknowledged, or if the estate has not been settled up so that it is possible to say whether the legacy will be paid;⁸ for until this takes place it cannot be told whether or no the legacy is due. And where the testator was a residuary devisee of an estate, a part of which consisted of real property, it was held, in construing a bequest by him of "all money due me," that the proceeds of the real property which had not been sold at the time of his death did not pass; for, though he would ultimately receive the proceeds as cash, he was not entitled to them *in that form at the date of his death*.⁹ "Money and se-

¹ Kendall v. Kendall, 4 Russ. 360; In re Pringle, Walker v. Stewart, L. R. 17 Ch. D. 819, 50 L. J. Ch. 689, 45 L. T. 11; Jenkins v. Fowler, 63 N. H. 244; Delamater's Estate, 1 Whart. 362.

² Summerhill v. Hannor, 72 Tex. 221, 9 S. W. R. 881.

³ Decker v. Decker, 121 Ill. 341, 12 N. E. R. 750.

⁴ Petty v. Wilson, L. R. 4 Ch. App. 574; Paul v. Ball, 31 Tex. 10; Blood v. Fairbanks, 48 Cal. 171; Littig v. Hance, 32 Atl. R. 343, 81 Md. 416; Smith v. Burch, 92 N. Y. 228, 234; Newbold v. Prichett, 2 Whart. (Pa., 1836), 46; In re Copia, 5 Phila. 214; Newman v. Newman, 26 Beav. 218; Smith v. Davis, 1 Grant (Pa.), 158. Cf. Dillon v. McDonnell, 7 L. R. Ir. 333.

⁵ Wolf v. Schaeffer, 51 Wis. 53, 61; Prichard v. Prichard, L. R. 11 Eq. 232.

⁶ Widener v. Beggs, 118 Pa. St. 374, 12 Atl. R. 311; In re Werry, 58 Hun. 608.

⁷ Bainbridge v. Bainbridge, 9 Sim. 16. Cf. Smith v. Burch, 92 N. Y. 228. A bequest of "money to which I am entitled" (at the execution of the will) carries money afterward received and in bank at the death of the testator. Morgan v. Thomas, L. R. 6 Ch. Div. 176.

⁸ Byram v. Brandreth (1872), L. R. 16 Eq. 475, 478; Martin v. Hobson, L. R. 8 Ch. App. 401, 406.

⁹ Stannard v. Barnum, 51 Md. 440, 445, 448 (1878), 1 Am. Prob. R. 160, 165; Sweet v. Burnett, 65 Hun. 159, 20 N. Y. S. 24, 32 N. E. R. 628, 186.

curities for money due me" does not pass a legacy due the testator, for such a legacy is neither money nor a secured debt.¹

Whether a gift of "money due me at the date of my death" will pass unliquidated damages has been differently determined. In one case it was held that a legacy in such terms carried damages for breach of contract subsequently recovered by the executor, on the ground that the money was due at the date of the testator's death, and that the action only ascertained the amount.² But it has also been held that a gift of this sort does not pass freight due on a ship chartered for a voyage which is not completed until after the death of the testator.³ And a gift of "cash or moneys, so called," while it would, under the above rules, carry money at the bank, will not include promissory notes or similar securities.⁴

§ 313. *Bequests of stocks, etc.*—A gift of "bank stock" may include railroad, state and municipal bonds,⁵ and money on deposit in a savings bank, at least where the testator had no stock in any bank.⁶ And available stock has, by a special context, carried all the residuary personal property.⁷ Shares in corporations will not usually pass under a bequest of money or securities for money.⁸ And a gift of my shares in a corporation will not include debenture shares,⁹ unless it appears that the testator, at the date of the execution of the will, owned no other stock which would answer the terms of the bequest.¹⁰ A gift

N. Y. 205. In this case the devise was "the money of A's estate *now belonging to me*."

¹ *Mason's Will*, 34 Beav. 494, 499. But a bequest of "all securities for money" will include money which is due the testator in respect of a vendor's lien for unpaid purchase-money. *Callow v. Callow*, 42 Ch. Div. 550.

² *Bide v. Harrison* (1873), L. R. 17 Eq. 76; *Booth v. Hutchinson*, L. R. 15 Eq. 30.

³ *Stephenson v. Dowson*, 3 Beav. 342, 349. "Money due or owing to me" carries a sum due the testator upon an assurance policy on his own life. *Petty v. Wilson*, L. R. 4 Ch. App. 574.

⁴ *Beales v. Crisford*, 13 Sim. 592.

⁵ *Clark v. Adkins*, 90 N. C. 629 (1884), 47 Am. R. 538.

⁶ *Tomlinson v. Bury*, 145 Mass. 346, 14 N. E. R. 137.

⁷ *Sweitzer's Estate*, 142 Pa. St. 541, 21 Atl. R. 835. "Stock to the *value* of —, etc.," means stock of the *par* value of —, in the absence of anything to the contrary. *Johnson's Estate*, 170 Pa. St. 177, 179, 32 Atl. R. 636.

⁸ *McDonnell v. Morrow*, 23 L. R. Ir. 591; *In re Maitland*, 74 L. T. 274. See *ante*, § 312.

⁹ *Dillon v. Arkins*, 17 L. R. Ir. 636; *In re Bodman* (1891), 3 Ch. 195, 61 L. J. Ch. 31, 65 L. T. 22, 40 W. R. 60.

¹⁰ *In re Weeding* (1896), 2 Ch. 364; *Morrice v. Aylmer*, L. R. 7 H. L. 717.

of "books and papers of every description" includes promissory notes;¹ of "all my accounts" passes a deposit in bank.²

§ 314. The meaning of the terms "household furniture" and "household goods."—By "furniture" or "household furniture" we are to understand whatever furnishes a house—whatever must be supplied to a house, a room, or the like, to make it habitable, convenient and agreeable for occupancy. Its primary meaning is the goods and chattels, vessels, utensils and other appendages which are placed in a house to render it fit for a human abode.³ Thus, a bequest of furniture or household furniture will include carpets, cooking-stoves and kitchen utensils,⁴ bronzes and statuary, pictures hung up for decoration,⁵ a numismatic collection if framed or otherwise placed in the house conveniently for use or for ornament,⁶ silver ornaments⁷ and plate for the use of the family.⁸ From this it is clear that the testator, by the use that he makes of other things than cabinet ware, may make them household goods or furniture. The books in his library,⁹ a clock,¹⁰ plate,¹¹ household linen,¹² china

¹ Perkins v. Mathes, 49 N. H. 107; Mathes v. Smart, 51 H. H. 538. Eq. 93; Richardson v. Hall, 124 Mass. 221, 228, 237.

² Gale v. Drake, 51 N. H. 78; Johnson v. Johnson, 92 Tenn. 559, 23 S. W. R. 559. A bequest of my shares in the A. bank includes all testator's shares, whether acquired by purchase or bequest, irrespective of the fact that those bequeathed to him have not yet been transferred to his name. Angell v. Home, 147 Mass. 241, 31 N. E. R. 1064. "Credits" means all money due the testator, whether on book accounts, promissory notes or bonds. Webster v. Wiggin, 19 R. L. 73, 34 Atl. R. 990.

³ Bell v. Golding, 27 Ind. 172, 179; Endicott v. Endicott, 41 N. J. Eq. 93; Marquam v. Sengfelder (Oreg.), 32 Pac. R. 679; Carnagy v. Woodcock, 2 Munf. (Va., 1811), 234. The furniture of a ship includes everything required to furnish or to equip her to make her seaworthy. Weaver v. Owens, 1 Wall. Jr. C. C. 369.

⁴ Ruffin v. Ruffin, 112 N. C. 102, 16 S. E. R. 1021.

⁵ Cremorne v. Antrobus, 5 Russ. 313, 319; Endicott v. Endicott, 41 N. J. Eq. 93; Richardson v. Hall, 124 Mass. 221, 228, 237.

⁶ Bunn v. Winthrop, 1 Johns. Ch. (N. Y., 1815), 329, 337; Cremorne v. Antrobus, 5 Russ. 313; Field v. Peckett (1861), 29 Beav. 573, 575.

⁷ Field v. Peckett, 29 Beav. 573.

⁸ Kelly v. Powlett, Amb. (1763), 605, 610; Ruffin v. Ruffin, *supra*; Nicholls v. Osborn, 2 P. W. 419; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329, 337; Endicott v. Endicott, *supra*; Cremorne v. Antrobus, *supra*; Porter v. Tournay, 3 Ves. 331; Stuart v. Bute, 11 Ves. 657, 666.

⁹ Ouseley v. Anstruther, 10 Beav. 462, 463; Cole v. Fitzgerald, 3 Russ. 301, 303; Carnagy v. Woodcock, 2 Munf. (Va., 1811), 234; Cornwall v. Cornwall, 12 Sim. 298, 304; Bridgeman v. Dove, 3 Atk. 201, 202 (1744). *Contra*, Kelly v. Powlett, Amb. 605.

¹⁰ Pellew v. Horsford, 2 Jur. (N. S.) 514.

¹¹ Chase v. Stockett, 72 Md. 235, 19 Atl. R. 761. Current coin have been included under a gift of medals. Dove v. Bridgeman, 3 Atk. 201, 202.

¹² Kelly v. Powlett, Amb. 605, 610.

and porcelain,¹ and wine,² and the specimens belonging to a large and well-selected collection of curiosities may be household goods or furniture, according to their connection with the residence of the testator and the habitual use of and access to them which he and the members of his family enjoy, and they will pass under a bequest of household goods, furniture or effects.

Furniture implies that which furnishes or equips.³ Hence it is clear that a gift of household furniture does not carry chattels which constitute a stock in trade;⁴ nor articles, such as watches and jewelry, which are used for ornament;⁵ nor guns, scientific instruments or a tricycle;⁶ nor agricultural implements or live-stock on a farm.⁷ A gift of "household furniture and articles of domestic or personal use and ornament" will carry a telescope⁸ and books,⁹ but not an altar-stone or similar relics,¹⁰ or a sailing yacht.¹¹ And, in conclusion, a gift

¹ Chase v. Stockett, 72 Md. 235.

² In re Bourne, 58 L. T. 537.

³ A bequest of household furniture was held to comprise, besides some of the articles mentioned in the text, a turning-lathe, models, an organ and a parrot, but not a fowling piece, unless used for domestic defense. Cole v. Fitzgerald, 1 Sim. & St. 189. In Pennsylvania it has been held that household furniture, etc., does not include a steam-engine. In re Parr's Estate, 20 Pa. Co. Ct. R. 184.

⁴ Pratt v. Jackson, 2 P. Wms. 302, 305 (1725), 8 Bro. P. C. 199; Farrant v. Spencer (1748), 1 Vesey, 97; Kelly v. Powlet, Amb. 605, 610; Crichton v. Symes, 3 Atk. 61; Stuart v. Marquis of Bute, 11 Ves. 657, 666. Thus, in the case of a bequest of household furniture in the will of a testator who had kept an inn, a boarding-house, or a school or private hospital, or who was a furniture manufacturer or dealer, there can be but little doubt that, on parol proof of his occupation, the meaning of the words would be restrained to the furniture which he had actually used in his house.

⁵ Gooch v. Gooch, 33 Me. 535, 536.

⁶ Manton v. Tabois, 54 L. J. Ch. D. 1008, 1010, 2 K. & J. 635.

⁷ 3 Jo. & Lat. 727, 29 L. J. Ch. 875.

⁸ Brooke v. Warwick, 2 De Gex & Smale, 425, 432.

⁹ 12 Sim. 303.

¹⁰ Petre v. Ferrers, 61 Law J. Ch. 426, 65 Law T. (N. S.) 568. A lapsed legacy of testator's watch, chain, clothing and jewelry does not fall within a residuary clause embracing household goods and effects, including books, pictures, furniture. In re Kimball's Will, 40 Atl. R. 847 (R. I., 1898). A gift of a house "with the household furniture, silverware, musical instruments, books, pictures, carriages, etc., used in connection therewith," does not include the testator's gold watch and chain. Woodcock v. Woodcock, 152 Mass. 353, 25 N. E. R. 612. A devise of a house, "including all the furniture and personal property in and upon the same, or in any way connected therewith," does not pass the title to money and securities in a safe in the house, where there is a residuary clause in the will. In re Reynolds, 124 N. Y. 988, 26 N. E. R. 612.

¹¹ Parry's Estate, 41 Atl. R. 443, 43 W. N. C. 62.

of "household furniture" will not carry mantels, stoves, mirrors, kitchen dressers, and similar tenant's fixtures annexed by the testator to a house which, at the date of his death, he holds under lease.¹

§ 315. **Stock on farm, live-stock, etc.**—The word "stock," when employed in connection with a devise of agricultural lands, has a settled legal meaning. In its popular sense it means cattle or sheep, being synonymous with "live-stock." Its legal meaning includes all domestic animals which are supported by or raised upon a farm or ranch, or which are customarily used in cultivating it, as horses, cattle, swine, sheep and poultry.² It cannot be held to include other personal property, as wool after shearing,³ or agricultural implements or gathered crops in barns or granaries.⁴

The word "stock" may, it is obvious, be used in another sense than as referring to live-stock on a farm, though the testator may be a farmer. He may by the context indicate that he means by the word "stock" shares in corporations, and not live-stock. Thus, where the testator gave separate tracts of land to his wife and children, and to his wife his cows and horses and money legacies, and directed "all his notes, bonds,

¹ *Finney v. Grice*, L. R. 10 Ch. D. (1878), 13, 14; *Paton v. Sheppard*, 10 Sim. 186. The term "objects of *vertu* and taste," coupled with a gift "of gold and silver plate, jewels, trinkets and ornaments," does not include valuable oil paintings, but they will pass under a gift of "furniture, statuary and effects." In *re Londesborough*, 50 L. J. Ch. 9, 43 L. T. 408. Primarily "wearing apparel" means garments, vestures and dresses for male or female, including hats and shoes. A gift of wearing apparel alone will not include jewelry or a watch, which are in no sense clothing, though it might include articles like pencils and penknives which are habitually carried upon the person and in the pockets of their owner. *Gooch v. Gooch*, 33 Me. 535, 536. But a gift of wearing apparel, except a gold watch, will, by the exception of

that which is not a garment, give the words a comprehensive meaning, and include other articles, as personal ornaments, household furniture, etc. *Crichton v. Symes*, 3 Atk. 61.

² *Graham v. Davidson*, 2 Dev. & Bat. (19 N. C., 1837), Eq. 155, 171, 172. As to the meaning of "all my cattle," *Hawes v. Foots*, 64 Tex. 22.

³ *Baker v. Baker*, 51 Wis. 538, 546. Whether a dog would pass under a gift of farm stock would seem to depend upon his usefulness as an adjunct to the farm, as, for example, if he were a shepherd dog or watch dog.

⁴ *Graham v. Davidson*, *supra*; *Kempf's Appeal*, 53 Mich. 352. A gift of "cattle, horses and carriages and farming stock and crop" comprised live-stock. *Randall v. Russell*, 3 Mer. 190, 194.

securities and money on hand to be divided among them, the court held, on the context, that the word "stock" meant shares in corporations, and not live-stock, and that the fact that the testator had no stock securities when the will was made or at the date of his death, while he had live-stock, could not be shown by parol evidence.¹

§ 316. **Personal property described by a reference to its locality.**—What does the testator intend to give where he bequeaths a box or chest, or a desk and "its contents," or all his property which is in or at his residence at A.? He may be presumed to know what property he has deposited or intends to deposit in a place of security which is under his control, and words indicating that he gives the receptacle and its contents would seem to carry everything that it contains *at his death*. And it has been so held, in the case of a gift of "a desk and all that is in it," whether the articles were placed there before or after the date of the execution of the will.²

But the testator, in describing his benefaction as contained in a desk or chest, runs a great risk of giving more than he intends. Those present during a man's last illness are accustomed to gather up any sums of money and all valuables or securities that may be scattered about the house, and to place them in some convenient closet or desk for safe-keeping. By this means articles of considerable value may be in the place of deposit at the time of his death which he never knew were there.

A gift of "all my goods and movables *in my study*" will carry plate and money found there, but not securities.³ And in an early case, where the testator, after bequeathing a pecuniary legacy, gave "whatever goods and things shall be *found in my closet* at my death," it was held that money did not pass, for the closet was a most unnatural place of safe-keeping for money, and, if the testator had intended to give a pecuniary legacy, it appeared he knew how to do it.⁴

¹Capehart v. Burrus (N. C.), 29 S. E. R. 97. But this is clearly wrong, for the circumstances of the testator are always admissible in a case of such latent ambiguity as this; and the fact that he never had shares of

stock would seem conclusive proof that he meant live-stock.

²Richmond v. Van Hook, 3 Ired. Eq. (38 N. C., 1845), 581.

³Gree v. Symonds, 1 Bro. C. C. 129.

⁴Roberts v. Kuffin, 2 Atk. (1740), 112, 113.

A gift of a trunk and its contents may pass promissory notes found in the trunk;¹ though where money was in terms excluded from a gift of the contents of a box, a promissory note did not pass.² A gift of "my chest and *its contents*" will not, of course, pass real estate, the deed of which is in the chest;³ and a bequest of a "desk *with the contents*," while it carries coin and Bank of England notes, will not carry the key of a box which held personal securities, which key was in the desk at the death of the testator.⁴

Another class of cases to be considered consists of those in which the testator disposes of property which may be "found in his dwelling-house" or "at his banker's." Under such a clause, no doubt, all property, *e. g.*, as the furniture and household effects of the testator, will pass which are in the dwelling-house at his death. Articles *temporarily removed* from the house to be repaired will pass,⁵ but not articles *permanently removed* with no intention of returning them,⁶ as where the testator had ceased to occupy the house.⁷ A gift of the contents of a house will not include articles which have been purchased with the intention of taking them there, which intention has failed.⁸

It is generally held that a devise of "all the testator's property, of whatsoever sort, which may be found *in his house*;"⁹ or a devise of his "house and *all that is in it*;"¹⁰ or a bequest of "all things in his house;"¹¹ or of "all goods and chattels in

¹ Lock v. Noyes, 9 N. H. (1838), 430, 434.

² Read v. Stewart, 4 Russ. 69; In re Robson (1891), 2 Ch. 559, 562.

³ Parrott v. Avery, 159 Mass. 594, 596, 35 N. E. R. 94.

⁴ In re Robson (1891), 2 Ch. 559, 562, 563. A key is but an accessory of the box, and belongs to the person to whom the box and not to him to whom the desk is given.

⁵ Land v. Devaynes, 4 Bro. C. C. 536, 537; Brooke v. Warwick, 2 De Gex & S. 425-432.

⁶ As to ademption by removal, see § 410.

⁷ Pellew v. Horsford, 2 Jur. (N. S.) 514; Haseltine v. Haseltine, 3 Mad. 276, 277; Spencer v. Spencer, 21 Beav. 548, 549. Compare Norris v. Norris,

2 Coll. 719. An engraving sold by the testator at a voidable sale and removed from his house does not pass as "chattels in my house at A. or elsewhere." Turner v. Turner, 28 W. R. 859. A devise of buildings with "what they *may contain*" includes carriages and horses in a stable. Kennedy v. Keily, 29 Beav. 223, 224.

⁸ Brooke v. Earl of Warwick, 2 De G. & S. 425, 436.

⁹ Fleming v. Brook (1804), 1 Sch. & Lef. 318; Moore v. Moore, 1 Bro. C. C. 127, 129; In re Scarbrough, 30 L. J. Prob. 85; Brooke v. Turner, 7 Sim. 671, 681.

¹⁰ Stuart v. Bute, 11 Ves. 657, 662; Lady Aylsbury's Case, Amb. 68.

¹¹ Anon., 1 P. W. 267; Crichton v. Symes, 3 Atk. 61, 62.

his house;"¹ or the testator's goods "at his banker's,"² will include coin, money and bank notes, but not stocks, bonds, mortgages, promissory notes, securities for the payment of money, or other choses in action.³ A gift of "my estate and movables here" in this house was held to include a large sum of money in the house at the death of the testator as well as live-stock and farming implements.⁴

But the rule is that choses in action have no locality, but follow the person of the testator.⁵ Hence a gift of "all things in my house,"⁶ or of "every article in or out of my house,"⁷ all my "effects, books, papers, etc., which my house contains,"⁸ or of "my personal property about the house,"⁹ will not include railroad shares, promissory notes, bills of exchange, and other choses in action which pass by assignment or by indorsement.¹⁰ A gift of "my home place with my household furniture, and all goods and chattels on said premises," does not include money in the house or promissory notes, for the words "goods and chattels" are restricted in their meaning by their collocation with "household furniture."¹¹ But bills of exchange, promissory notes, checks and drafts indorsed by the testator in blank, are to be regarded as money, and will pass as such under a bequest of "everything in the house."¹²

¹ Chapman v. Hart, 1 Ves. Sr. 271, 273.

² Marquis of Hertford v. Lowther, 7 Beav. 1, 8.

³ See also In re Reynolds, 124 N. Y. 388, 395, 26 N. E. R. 954.

⁴ Swinfen v. Swinfen, 28 Beav. 207, 210, following Chapman v. Hart, 1 Ves. Sr. 272, 273.

⁵ 2 Black. Com., pp. 396, 442.

⁶ Moore v. Moore, 4 Ves. 166; Chapman v. Hart, 1 Ves. Sr. 272.

⁷ Collier v. Squire, 8 Russ. 467.

⁸ Webster v. Weirs, 51 Conn. 569.

⁹ Benton v. Benton, 63 N. H. 289, 56 Am. R. 512. Cf. Andrews v. Schoppe, 84 Ma. 170; Dickson's Estate, 7 Pa. Dist. 699.

¹⁰ A bequest of "all my things in the house remaining, and all moneys both in the house and out of it," while it includes money in the house and in bank, will not include con-

sols and shares in a building and loan association. Collins v. Collins, L. R. 12 Eq. Cas. 455. A devise of "all my property, of whatever nature or kind the same may be, that may be found in A's house (except a bond of B. in my writing box"), was held *not* to include a mortgage, and another bond, and bankers' receipts for money which were in the house; the court, in thus holding that the word "property" was not sufficient to carry securities, also stated that the exception of one security did not show an intention on the part of the testator to give others. Fleming v. Brook, 1 Sch. & Lef. (1804), 318; Trafford v. Berrige, 1 Eq. Cas. Ab. 201.

¹¹ Peaslee v. Fletcher, 60 Vt. 188, 14 Atl. R. 1.

¹² Lock v. Noyes, 9 N. H. 430, 435.

§ 317. **Gift of "proceeds."**—The word "proceeds" is a term of great generality. It may mean profits, produce or income, as when land or money is devised in trust, the proceeds to be paid to A. for life or for a term of years. It may and usually does mean the money or other valuable thing which is paid or delivered as the return for real property sold.¹ A devise of the proceeds of land is a devise of the land itself,² and the devisees may elect to partition it without a sale.³

§ 318. **Direction to provide a "home."**—Such a direction in a will is of very uncertain meaning, though it may be made certain by a consideration of the circumstances of the testator and of his relations to the beneficiary. He may have meant simply to provide a place of abode which may be either a single room, unfurnished or not, or a commodious house with improvements and conveniences and luxuriantly furnished. So the question may arise, Did the testator intend to give food and attendance as well as shelter? In the case of an infant, Did he intend to provide for his education, or, in the case of an invalid, for his nursing and medical attendance? The meaning of the word depends on the circumstances of each case.⁴ Thus, it was held that a direction to provide a home for the sister of the testator meant that she should be supplied with medicine as well as with shelter and food; and that, where she was about eighty years of age, an invalid and totally helpless, her only income being a small pension, a nurse should be hired to attend to her wants. But providing a home will never include providing either clothing or pocket-money.⁵ And where

¹ *Birmingham v. Lisan*, 77 Me. 494, 497, 1 Atl. R. 151; *Phelps v. Harris*, 101 U. S. 380; *Emery v. Society*, 79 Me. 334, 342. Cf. *Chapman v. Chapman*, 87 Ky. 140, 7 S. W. R. 901.

² *Post*, § 692, and §§ 719–725.

³ *Hunt v. Williams*, 127 Ind. 498, 26 N. E. R. 177; *In re Smith*, 154 Mass. 479, 28 N. E. R. 903. Compare *Shephard v. Clark*, 38 Ill. App. 66. Under a devise of the "proceeds" of a mortgage, the results of the mortgage pass in whatever form they may be at the death of the testator. Where it had been foreclosed and

the property bought in, it passed under the devise. *Amer. Bible Soc. v. Holman*, 5 Rep. 645.

⁴ "A home and a comfortable support," where the entire estate was of the value of \$250, consisting of a mortgaged farm, means that the whole estate should be devoted to the purpose, without any restriction as to where the legatee was to reside. *Barnes v. Kelly* (Conn.), 41 Atl. R. 772.

⁵ *Denfield v. Smith*, 156 Mass. 265, 30 N. E. R. 1018. See *Soner v. Halsey*, 85 Hun, 464, 33 N. Y. S. 103.

the testator directed that his daughter should be provided with a home until her marriage, the court held that the home intended was to be located upon the premises where the testator resided at his death.¹ The home thus given is a local habitation and place of residence. It is the right to the enjoyment of a certain house, or part of one, as a dwelling, which is confined to so much of it as is necessary. It is a gift of a privilege absolutely personal, which cannot be assigned, leased, partitioned or given to each in severalty. The party to whom it is given may enjoy it or leave it, but he cannot claim compensation unless he is hindered or driven away.²

§ 319. The terms "legacy" and "devise" distinguished. The word "legacy" ordinarily means a gift of personal property by will, and does not include real estate, unless something in the will shows that such was the intention of the testator. If, however, it appears from the context that the testator, in using the word "legacy," refers to a gift of real property, the word will lose its ordinary meaning, and will be regarded as meaning real property.³ Accordingly where the testator, after devising certain land to various persons, to some of whom he also gave pecuniary legacies, provided that if any of them should die without issue, the "*said legacy*" should go to others, the word "legacy" was construed to refer not only to the gifts which were legacies in fact and in law, but to devises as well.⁴ The ordinary meaning of the word, as will be seen, is thus set aside for another, which is peculiar, and often incorrect, but which arises because of a reference to a prior gift. So, too, where the testator uses the word "legacy" correctly to refer to a previous gift of personal property, it may receive a peculiar and restricted meaning, as in a recent case where it was held that the testator, in bequeathing \$2,500 to certain persons be-

¹ Parker v. Parker, 126 Mass. 433.

² Addison v. Bowie, 2 Bland Ch. (Md.) 606, 627.

³ Burwell v. Mandeville, 2 How. (U. S.) 578; Pratt v. McGhee, 17 S. C. 432; Bacon v. Bacon, 55 Vt. 248; Russell v. Elden, 15 Me. 193; Lasher v. Lasher, 18 Barb. (N. Y.) 106, 109, 110. The word "legacies," in a direction that *legacies* shall abate in case of a

deficiency, must be taken in its proper sense as meaning gifts of personal property. So a direction to distribute a surplus of money or personal property "among legatees" means those who receive legacies and not devisees. Ellis v. Meadows, 84 N. C. 92. See also *post*, § 416.

⁴ Hope d. Brown v. Taylor, 1 Burr. 268; Hardacre v. Nash, 5 T. R. 716.

cause they "were not remembered by a legacy" in the will, did not mean by the word "legacy" trivial gifts of pictures, which he had bequeathed to some as keepsakes, but that the legacy referred to must be considered a pecuniary legacy.¹

Again, the words "legatee" and "devisee" are frequently used by the testator interchangeably, with a preference for the former word, as one with which testators are more familiar. If the testator owns a large amount of real estate, and the introductory clause of his will states it is his intention to dispose of *all of his estate*, and, after disposing of certain land and various pecuniary legacies, states that he wants A. to be his "residuary legatee," it is safe to presume that he wishes A. to take the land which is undisposed of, as well as all the personal property.²

The word "bequeath" primarily means to give personal property by will, but its meaning is easily moulded by the context, until it becomes exactly equivalent to devise.³ If it is apparent on the face of the will that the testator intends to give *all* his property by will, as by a direction to *divide his whole estate among certain persons*, and it appears that he had a large quantity of real estate,⁴ or where the testator uses the word "bequeath" directly in connection with words indicating an intention to dispose of real as well as personal property,⁵ the court will not err in permitting real estate to pass where the word "bequeath" or "bequest" only is used. Not only is the word "bequeath" often incorrectly used for "devise," but the latter is sometimes, though not so frequently, incorrectly substituted in place of the former. If the testator "devises" his whole estate, the larger portion of which is personal property, and it seems apparent on the whole will that he did not intend to die intestate as to his personal property, no impropriety is com-

¹ *White v. Massachusetts Inst. of Technology*, 50 N. E. R. 512 (Mass., 1898).

² *Hughes v. Pritchard*, L. R. 6 Ch. D. 24. Of course where the testator has directed an out and out conversion of his land into money, and appoints a residuary legatee, it will be presumed that he intended the person thus designated to take the proceeds

of the landed property to the same extent as he would personal property. *Singleton v. Tomlinson*, 3 App. Cases, 404; *Wildes v. Davies*, 1 Smale & Gif. 475.

³ *Bedford v. Bedford* (Ky., 1898), 85 S. W. R. 926; *Dow v. Dow*, 86 Ma. 211.

⁴ *Shumate v. Bailey*, 20 S. W. R. 178, 110 Mo. 411.

⁵ *Pitman v. Stevens*, 15 East, 505.

mitted in inserting the word "bequeath," thus including the personal property.¹

§ 320. **Share, part or portion.**—These words usually mean an interest or estate in property owned by one of several in common, and refer to that portion of the undivided property which belongs to any one of them.² How much it shall include depends upon the language of the will. A gift of the "share" of one legatee to another will include *all* that the former takes under the will, whether contingent or vested,³ income or *corpus*,⁴ and whether it consists of a specific legacy or devise or of an interest in property given generally.⁵ The word "share" is not equivocal, and parol evidence is not admissible to show what was intended.⁶

§ 321. **Definitions of the words "also," "likewise," "furthermore," "moreover," "item," etc.**—The word "also" has several significations. It may mean in addition to, as well as, besides, or furthermore, or it may mean likewise, in like manner. Such terms as "also," "as well as," "besides," "in addition to," "moreover," "furthermore" and "likewise," are nearly synonymous and may be used interchangeably, except so far as their repetition is avoided to secure euphony. The word "also," as employed in wills, frequently indicates merely the beginning of a new clause. Under such circumstances it means no more than "*item*," or "in addition," if the clauses are separate and independent.⁷ For, where the two clauses are separate and distinct, neither one depends upon nor relates to the other; and either taken separately is equally intelligible as an expression of the testator's intention.⁸

¹ Ladd v. Harvey, 21 N. H. 528; Fetrow's Estate, 58 Pa. St. 424.

² Turner v. Balfour, 25 Atl. R. 448, 62 Conn. 89; Smith v. Terry, 43 N. J. Eq. 659.

³ Eisiminger v. Eisiminger, 129 Pa. St. 564, 18 Atl. R. 557.

⁴ Johnson v. Childs, 23 Atl. R. 719, 61 Conn. 66.

⁵ Hardman v. Johnson, 3 Mer. 348, 352; Doe v. Gell, 2 B. & Cr. 680, 4 Dow. & Ry. 387, 391, Stopford v. Stopford, 5 East (1804), 501, 508.

⁶ Armistead v. Armistead, 32 Ga.

597, 601. The court held the will void where "one share was given to A." after payment of money legacies, and "the one share of what remains to B.," and "one-fourth of a share of what then remained" to others.

⁷ Evans v. Knorr, 4 Rawle (Pa., 1834), 68, 70.

⁸ Hyman v. Williams, 12 Ired. (N. C.) 92; Allison v. Bates, 6 B. Mon. (45 Ky., 1846), 80; Fenny v. Eustace, 4 Maule & Sel. 60; Child v. Elsworth, 2 De Gex, M. & G. 679; Richards v. Baker, 2 Atk. 321.

Under some circumstances the word "also," placed at the beginning of a clause, may indicate that the gift conferred in that clause is vested in or to be enjoyed by the beneficiary to the same extent, or on the same conditions, or subject to the same limitations, as a gift which preceded it. For, where the disposition as contained in one clause of the will, taken by itself, is unintelligible and incomplete, and this clause is apparently connected by the term "also" with one which is intelligible and complete, the two may thereby be assimilated in order to arrive at a consistent interpretation of the intention of the testator. For example, where the devise was of "all my estate to A.," which was construed a fee, and "*also*" the Bell Tavern, it was held that A. took a fee-simple in the Bell Tavern.¹ So, where the devise was of all the furniture of a testator, "*also* one-third of his estate in lieu of dower during widowhood," the limitation of the estate for widowhood was by relation, and by construing the word "*also*" to mean "in like manner," affixed to the interest in the furniture.² On the other hand, it has been held in construing clauses similarly worded that the word "also" did not mean "in like manner," but had the meaning of "besides," "in addition to" or "furthermore," as where the gift was of a life estate in lieu of dower, and *also* a legacy of \$4,000 to A.³ And where the devise was "one-half my real property" to A. in indeterminate language, "*also* all my personal property for life,"⁴ the court held that the limitation for life was not affixed to the devise of the other property.

The word "likewise" at the beginning of a clause is nearly synonymous with "also," and means a new gift, in addition to what has been given.⁵ But it does not of necessity always denote a separate or distinct gift when it is used to introduce a clause, and may be synonymous with "in like manner," qualifying or limiting a gift in another clause which precedes it. The word "*item*," which is nearly equivalent to "likewise" or "also," is generally used to introduce any particular in an

¹ *Cole v. Rawlinson*, Holt, 744, 2 Lord Raym. 831, 1 Salk. 234.

⁴ *Sherman v. Wooster*, 26 Iowa (1868), 272.

² *Morgan v. Morgan*, 41 N. J. Eq. 235.

⁵ *State Bank v. Ewing*, 17 Ind. (1861), 68, 74.

³ *Loring v. Hayes*, 86 Ma. 351, 357.

enumeration after the first, that being indicated by the word "*imprimis*,"¹ which is the customary word employed to introduce new and distinct matter. Ordinarily a clause thus introduced will neither influence nor be influenced by a preceding or subsequent clause, unless it is absolutely impossible to understand it without such reference.² It means no more than "moreover," "besides," or "in addition" thereto; and ordinarily is used simply to distinguish various clauses of the will one from the other. But in a case where one clause as it stands is so imperfect, fragmentary and unintelligible that the intention of the testator must be ascertained from the context, the word "item" may justify a reference to a preceding clause which will make its meaning complete. Thus, in a very early case, where the language of the will was, "*item*, I give the Manor of D., *item*, I give the Manor of S. to A. and his heirs," the court construed the will to be a devise of the Manor of D. to A. and his heirs, by the force of the word "item" meaning "in like manner."³

§ 322. Use of "between" and "among."—The word "among," in its grammatical use, indicates a collection of objects or persons more than two in number, and by its derivation suggests a mingling. It is never properly followed by two objects only, but may be used properly with collective nouns, as, "among a crowd." "Between" indicates two only, its entire etymology being "*by twain*." Preceded by the word "divide," the two words are frequently used as synonymous, and either will be readily substituted for the other to carry out the testator's intention. Where a division was directed between A.'s children,⁴ who had several children, or "between my wife and children," the testator having four children, in equal shares,⁵ or between the wife of the testator and his daughters A. and B.,⁶ "among" was substituted for "between," and each legatee

¹ Standard Dictionary.

² *Cheeseman v. Partridge*, 1 Atk. (1739), 436, 488; *Evans v. Knorr*, 4 Rawle (Pa.), 67; *Hopewell v. Ackland*, 1 Salk. 239.

³ *Moore*, 52, 53, pl. 153, *Dyer*. In one case the word "with" was construed to mean "in like manner." The devise of land in A. to a man and his

heirs *with land in B.* *Leeke v. Bennet*, 1 Atk. 470. See *post*, § 423, as to additional legacies.

⁴ *Ward v. Tomkins*, 80 N. J. Eq. 3; *Myres v. Myres*, 23 How. Pr. (N. Y.) 410, 415, 416.

⁵ *Lord v. Moore*, 20 Conn. 122.

⁶ *Appeal of Hicks*, 134 Pa. St. 507, 19 Atl. R. 705.

took a share *per capita* and not *per stirpes*.¹ But it cannot always be presumed that the testator has used "between" in the sense of "among" in one clause, where he has used the latter word correctly in other portions of the will, and where "between" would presumptively indicate a provision *per stirpes*. And the presumption that "between" is used in the sense of "among" is always removed where it is coupled with words indicating an intention to divide equally, as, for example, in equal shares, or share and share alike.

¹See also *In re Ihrle's Estate*, 29 Sargent, 118 Mass. 341, 343; *Crow v. Atl. R.* 750, 162 Pa. St. 369; *Haskell v. Crow*, 1 Leigh (Va.), 85.

CHAPTER XV.

THE RULE OF THE LAPSE OF LEGACIES.

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| <p>§ 324. Definition and general rule of lapse.</p> <p>325. Lapse in the case of a gift to several as co-tenants.</p> <p>326. The doctrine of lapse as applied to gifts to classes.</p> <p>327. The lapsing of gifts to executors.</p> <p>328. The doctrine of lapse in its application to legacies charged upon land.</p> <p>329. The rule of lapse in the case of gifts to creditors.</p> <p>330. Lapse in the case of directions releasing debts which are due the testator.</p> <p>331. The prevention of the lapsing of a legacy.</p> <p>332. The effect of words of limitation in case of lapse—Gifts to A. and his heirs.</p> <p>333. The rule of lapse upon the failure of gifts upon a double contingency—Substitution of "and" for "or."</p> | <p>§ 334. The death of a legatee subsequent to the death of the testator.</p> <p>335. The destination and disposition of testamentary gifts which lapse—The rule as to land acquired after the execution of the will.</p> <p>336. The disposition of property comprised in a lapsed residue.</p> <p>337. Statutory provisions regulating lapse.</p> <p>338. The meaning of the words "descendants" and "relations" as used in the statutes.</p> <p>339. The title of the heirs or issue who are substituted by the statutes.</p> <p>340. The effect of the statute where the legatee is dead at the execution of the will.</p> |
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§ 324. Definition and general rule of lapse.—Because of the fact that the will does not take effect until the death of the testator to vest any interest, it follows that in the case of an immediate gift, whether of real or personal property, where the beneficiary dies before the testator, the gift lapses. The same rule was at common law applied to real property and to personal property, and the fact that the gift was to the beneficiary and his heirs, or in any other terms giving the beneficiary an absolute interest, did not, independently of statute, prevent the doctrine from applying if he died before the testator. For the word "heirs" in such case gives the heirs no interest under the will, but it is merely a word of limitation, showing what

interest the ancestor was to take in case he should survive the testator.¹ If the gift vests on the death of the testator, it will *not* lapse because of the death of the beneficiary before the time arrives for his enjoyment in possession. But if vesting is postponed until some time after the death of the testator, the fact that the beneficiary survives him is not material. If he dies before the date of vesting arrives there is a lapse.²

§ 325. **Lapse in the case of a gift to several as co-tenants.** The doctrine of lapse is not applicable to a gift by will to several persons who are to take as joint tenants unless all shall die before the death of the testator or the date of vesting. The rules by which it is determined whether beneficiaries under a

¹ *Post*, §§ 332, 606.

² *Bill v. Payne*, 63 Conn. 140, 25 Atl. R. 354; *Rockwell v. Bradshaw*, 67 Conn. 9, 34 Atl. R. 758; *Cropley v. Cooper*, 7 D. C. 226, 19 Wall. 167; *Davie v. Wynn*, 80 Ga. 673, 6 S. E. R. 183; *Holbrook v. McLeary*, 79 Ind. 167, 170; *Maxwell v. Featherstone*, 83 Ind. 339, 341; *West v. West*, 89 Ind. 529, 531; *Borgner v. Brown*, 133 Ind. 391, 396; *Gore v. Stevens*, 1 Dana (Ky., 1833), 201, 205; *Alexander v. Woller*, 6 Bush (Ky.), 340, 345; *Thompson v. Myers*, 95 Ky. 597, 598, 26 S. W. R. 1014; *Wakefield v. Small*, 74 Me. 277, 279; *Keniston v. Adams*, 80 Me. 290, 14 Atl. R. 203; *Morse v. Hayden*, 82 Me. 227, 230, 19 Atl. R. 443; *Merrill v. Hayden*, 86 Me. 133, 135; *Elliott v. Fessenden*, 88 Me. 204; *Stetson v. Eastman*, 84 Me. 366, 24 Atl. R. 868; *Trippe v. Frazier*, 4 H. & J. (Md., 1819), 446, 447; *Ballard v. Ballard*, 18 Pick. 41; *Prescott v. Prescott*, 7 Met. (Mass.) 141, 145; *Paine v. Prentiss*, 5 id. 396, 399; *Goddard v. May*, 109 Mass. 468, 471; *Workman v. Workman*, 2 Allen (Mass.), 472, 473; *Lombard v. Boyden*, 5 Allen (Mass.), 249, 250; *Thayer v. Wellington*, 9 Allen (Mass.), 283, 295; *Stedman v. Priest*, 103 Mass. 293, 296; *In re Batchelder*, 147 Mass. 465; *McGreevy v. McGrath*, 152 Mass. 24, 25 N. E. R. 29; *Pollock v. Farnham*, 156 Mass.

383, 31 N. E. R. 298; *Swallo v. Swallo*, 166 Mass. 241, 244; *Wood v. Seaver*, 158 Mass. 411; *Hibler v. Hibler* (Mich.), 62 N. W. R. 361; *Cady v. Cady*, 67 Miss. 425, 431; *Strong v. Smith*, 84 Mich. 567; *Martin v. Lachasse*, 47 Mo. 591, 593; *Goodwin v. Colby*, 64 N. H. 401; *Garland v. Smiley*, 51 N. J. Eq. 198, 202, 26 Atl. R. 164; *Hard v. Ashley*, 23 N. E. R. 177, 117 N. Y. 606; *Duclos v. Benner*, 32 N. E. R. 1002, 136 N. Y. 560; *Cochrane v. Schell*, 140 N. Y. 516; *In re Smith's Estate*, 11 N. Y. S. 783; *In re Muir's Estate*, 46 Hun (N. Y.), 555; *Lefler v. Rowell*, Phill. Eq. (63 N. C., 1866), 143; *Perry v. Logan*, 5 Rich. Eq. (S. C.) 202; *Massey's Appeal*, 88 Pa. St. 470, 1 Am. P. R. 307; *Powell's Estate*, 22 Atl. R. 92, 138 Pa. St. 322; *In re Wain's Estate*, 156 Pa. St. 194, 27 Atl. R. 59; *In re Gilmor's Estate*, 154 Pa. St. 523, 32 W. N. C. 272, 26 Atl. R. 614; *Sloan v. Hanse*, 2 Rawle (Pa.), 28; *Barnett's Appeal*, 104 Pa. St. 342; *Comfort v. Mather*, 2 W. & S. (Pa.) 450; *Almy v. Jones*, 17 R. I. 265, 21 Atl. R. 616; *Piond v. Allen*, 15 R. I. 171, 2 Atl. R. 302; *Dixon v. Cooper*, 88 Tenn. 177, 12 S. W. R. 445; *Saxton v. Webber*, 83 Wis. 617, 624; *Clever v. Clever*, 39 Wis. 96; *Halsey v. Convention*, 75 Md. 275, 23 Atl. R. 781; *Church v. Church*, 28 Atl. R. 302, 15 R. I. 138. See also *post*, §§ 341-355.

will take as tenants in common or as joint tenants need not be discussed in this place, as they are to receive a full consideration in another portion of this treatise.¹ All that is necessary to say here is that where, upon the construction of the will, it is clear that a gift in joint tenancy was intended, the element of survivorship, which is inseparably attached to such gift, will prevent a lapse, and the survivor or survivors who may outlive the testator take the whole.² On the other hand, where the primary devisees take as tenants in common, the shares of those who die before the testator lapse, in the absence of a clear expression of intention that they shall go to others in the case of death before the testator, and go to the residuary beneficiary or to the executor or heir of the testator according to the nature of the property disposed of.³

¹ §§ 532-545, *post*.

² *Billingsly v. Harris*, 17 Ala. 214; *Bolles v. Smith*, 39 Conn. 217, 219; *Bill v. Payne*, 62 Conn. 140, 143; *Anderson v. Parsons*, 4 Me. 486, 491; *Craycroft v. Craycroft*, 6 Har. & J. (Md.) 54, 57; *Dow v. Doyle*, 108 Mass. 489, 491; *Prescott v. Prescott*, 7 Met. (48 Mass.) 141; *Jackson v. Roberts*, 14 Gray (80 Mass.), 546, 550; *Armstrong v. Armstrong*, 14 B. Mon. (53 Ky.) 333, 342, 345; *Tillinghast v. Cook*, 9 Met. (50 Mass.) 143, 147; *Martin v. Lachasse*, 47 Mo. (1871), 591, 593; *Loring v. Coolidge*, 99 Mass. 191; *Stephens v. Milner*, 24 N. J. Eq. 358, 376; *Putnam v. Putnam*, 4 Bradf. (N. Y.) 308, 309; *O'Brien v. Dougherty*, 1 App. D. C. (N. Y.) 148; *Norris v. Beyea*, 15 Barb. (N. Y.) 416; *Mebane v. Womack*, 2 Jones' Eq. (53 N. C.) 293, 301; *Dunlap v. Dunlap*, 4 Des. Eq. (S. C.) 305, 315; *May's Appeal*, 41 Pa. St. 512; *Church v. Church*, 15 R. I. 138, 139; *De Camp v. Hall*, 42 Vt. 483, 486; *In re Yates* (1891), 3 Ch. 453; *Bostock v. D'Eyncourt*, *id.*; *Davis v. Kemp*, Carth. 45; *Eq. Cas. Ab.* 216, pl. 7; *Buffar v. Bradford*, 2 Atk. 220.

³ *Bolles v. Smith*, 39 Conn. 217, 218;

Morris v. Bolles, 31 Atl. R. 538, 65 Conn. 45, 50, 52; *Simmons v. Spratt*, 26 Fla. 449, 458, 8 S. R. 123; *Gray v. Bailey*, 42 Ind. 349, 350; *Spencer v. Chick*, 76 Me. 347, 350; *Stetson v. Eastman*, 84 Me. 366, 374; *Robinson's Appeal*, 88 Me. 17; *Morse v. Hayden*, 83 Me. 227, 230; *Horton v. Earle*, 161 Mass. 448, 450, 38 N. E. R. 1133; *Mount v. Mount*, 3 N. Y. S. 190, 191; *Armstrong v. Moran*, 1 Bradf. (N. Y.) 314, 315; *Workman v. Workman*, 2 Allen (Mass.), 472, 473; *Lombard v. Boyden*, 5 Allen, 249, 251; *Frost v. Courtis*, 167 Mass. 251, 45 N. E. R. 687; *Mason v. Trustees, etc.*, 27 N. J. Eq. 47; *Hand v. Marcy*, 28 N. J. Eq. 59, 64; *Floyd v. Barker*, 1 Paige (N. Y.), 480, 481; *Van Beuren v. Dash*, 30 N. Y. 393, 415; *In re Kimberly*, 150 N. Y. 90, 93; *Mebane v. Womack*, 2 Jones' Eq. (N. C.) 293; *Allison v. Kurtz*, 2 Watts (Pa.), 185; *In re Steinmetz's Estate*, 3 Pa. Dis. Ct. Rep. 440; *Moffett v. Elmendorf*, 154 N. Y. 475, 485, 46 N. E. R. 845; *In re Muir's Estate*, 46 Hun, 555, 557; *Saxton v. Webber*, 83 Wis. 617, 624. *Contra*, *Church v. Church*, 15 R. I. 138; *Page v. Page*, 2 P. W. 489; *Sykes v. Sykes*, L. R. 4 Eq. 200.

§ 326. **The doctrine of lapse as applied to gifts to classes.**—The rule that a legacy shall lapse, upon the death of a legatee before the death of the testator, is applicable to the case of a gift to a class which is fluctuating as to the persons which compose its membership during the life-time of the testator. Where the property is to vest in the members of the class *as it exists at the death of the testator*, it will vest in those persons only who are members of the class at that time. Until the death of the testator occurs it is impossible to say who are the objects of his bounty as members composing the class. Who will ultimately take is uncertain. But it is certain that in any event, from the character of the gift itself, no one who might take, if he survived the testator, can by any possibility take if he does not. His survival of this event is an *implied condition precedent* of his taking, and results, not from any rule of law, but from the intention of the testator that he shall take only in case he is a member of the class at the date when alone, according to legal rules, its membership can be ascertained. Hence there can be no lapse even where the members of the class take, at the death of the testator, as tenants in common. And this principle is applicable, though it is certain that there can be no increase of the class during the life of the testator, as where a devise is made to the children of A., and A. has died prior to the execution of the will.¹

¹ Rockwell v. Bradshaw, 34 Atl. R. 758, 67 Conn. 9, 17; Security Co. of Hartford v. Cone, 64 Conn. 579, 580; Davie v. Wynn, 80 Ga. 673, 675, 31 Atl. R. 7; Hempstead v. Dickson, 20 Ill. (1858), 193, 195; Yeates v. Gill, 9 B. Mon. (Ky.) 203, 206; Workman v. Workman, 2 Allen (Mass.), 472, 473; Schaffer v. Kettell, 14 Allen (Mass.), 528, 531; Jackson v. Roberts, 14 Gray, 546; Bates v. Dewson, 128 Mass. 334, 335; Peck v. Carleton, 154 Mass. 230, 233; Dorr v. Lovering, 147 Mass. 530, 534; Loring v. Carnes, 148 Mass. 198, 202; Towne v. Weston, 132 Mass. 513, 517; Bancroft v. Fitch, 164 Mass. 401, 402; Ballard v. Ballard, 18 Pick. (Mass.) 41; Jackson v. Staats, 11 Johns. (N. Y.) 337; Jackson v. Mer- ritt, 6 Johns. (N. Y.) 85; Downing v. Marshall, 23 N. Y. 336; Stires v. Van Rensselaer, 2 Bradf. (N. Y.) 192; Shuttleworth v. Greaves, 4 My. & C. 35; Dimond v. Bostock, L. R. 10 Ch. 358; Pinbury v. Elkins, 2 Ves. 758, 766; Fell v. Biddolph, L. R. 10 C. P. 701; Viner v. Francis, 2 B. C. C. 658; King v. Withers, 3 B. P. C. Toml. 195; In re Smith's Will, 20 Beav. 197; McLachlin v. Tait, 28 Beav. 408; Leigh v. Leigh, 17 Beav. 605. The general rule is that an *immediate gift to a class*, where possession is to be given *at the death of the testator*, takes effect and includes only those who constitute the class at the death of the testator. Hence, of necessity, those who die in the life-time

The statutes which have been enacted to prevent lapse in certain cases have been construed to apply to gifts to classes, particularly where the statute provides that no devise or legacy "to a lineal descendant of the testator" shall lapse by his or her death before the death of the testator. Accordingly, in the case of a gift by will to the children or the grandchildren of the testator as a class, the issue of any member of the class who dies *before the testator* shall receive his or her parents' share.¹

§ 327. The lapsing of gifts to executors.—A legacy to "*my executors hereinafter named*," who are to take the legacy and, after applying it to pay debts and other legacies, are to

of the testator are excluded, and their shares lapse, in the absence of a contrary provision. In re Brown, 86 Me. 572, 581; Scott v. West, 68 Wis. 565; Haffen's Estate, 70 Wis. 522, 524; Brooks v. Carter, 118 Mass. 407, 408; Merriam v. Simonds, 121 Mass. 198, 202; Worcester v. Worcester, 101 Mass. 128, 132; Howland v. Slade, 155 Mass. 415, 416; Horton v. Earle, 163 Mass. 448, 450; Striewig's Estate, 169 Pa. St. 61, 82 Atl. R. 83, 84. Where the possession is postponed the class will include all persons in the class at the date of postponement. In re Caverly's Estate, 51 Pac. R. 629 (Cal., 1897). The rules of law and of construction appertaining to class gifts are fully explained *post*, §§ 546-564 and 593 et seq.

¹Stockbridge's Petition, 145 Mass. 517, 520; Moore v. Weaver, 16 Gray (Mass.), 305; Moore v. Dimond, 5 R. I. 121, 129; Jamison v. Hay, 46 Mo. 546, 553; and in this last case, and in Guitar v. Gordon, 17 Mo. 408, 414, where the gift was to all the children of the testator, the issue of some who were dead *at the date of the will* were permitted to take. In Massachusetts the statute provides that "when a devise or legacy is made to a child or other relative, and the devisee or legatee dies leaving issue, the latter shall take." From

the text it will be seen that it is never necessary that the gift shall be to the child or relative *by name*. To the same effect, see Bradley's Estate, 81 Atl. R. 96, 166 Pa. St. 300, 303. *Cf. post*, § 547. "A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description, and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacies are given be not described as a class, but by their individual names and additions, though altogether constituting a class, those who may constitute the class at any particular time may not in any respect correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided among the children of A. at a particular time, those who constitute the class at that time will take; but if the legacy be given to B., C. and D., the children of A., as tenants in common, and one die before the testator, the survivor will not take the share of the deceased

retain the balance for their own use to recompense them for their trouble, is a legacy to the executors as a class. Only those can take who constitute the class at the death of the testator, for those only who perform the duty are entitled to the recompense. The office is joint,¹ and, for that reason, so is the legacy. And it is not material that the gift is to be equally divided.² But where the testator, after bequeathing specific legacies to several persons by name, divides his residue among "the legatees before named," the latter gift is not to a class; and one of the specific legatees having died, causing a lapse, her share of the residue was not to be divided among the other residuary legatees, but went as personal property undisposed of.³

§ 328. **The doctrine of lapse in its application to legacies charged upon lands.**—The death of a devisee of lands which are devised, charged with a legacy to be paid out of the rents and profits, causing the devise to lapse, has no effect upon the legacy, for that is still good and must be paid. The residuary devisee must pay it if there is a residuary clause. If there is none, or if the land itself was a part of the residuum, then it must be paid by the heirs of the testator, who take subject to the lien of the charge.⁴ The converse question as to the disposition of a legacy, the payment of which is a charge upon land in case of the death of the legatee, is not without difficulty. If the legacy is payable at the death of the testator, and the legatee dies before the testator, the usual rule of lapse will apply, unless the testator has employed language which clearly indicates that the personal representative of the legatee is to take.⁵ All the cases are agreed upon this point; but they are not harmonious where the legacy or an annuity is to be paid out of the proceeds of the sale of real estate, or out of the rents and profits of the same *at some future time*, and the primary legatee dies *after* the death of the testator but *before* the day of payment arrives. If the legacy is not vested, *i. e.*, where it

child." By Lord Cottenham, in *Barber v. Barber*, 3 My. & Cr. 697; and see, also, *Bain v. Lescher*, 11 Sim. 397; *Boulcott v. Boulcott*, 2 Drew. 25.

¹ *Post*, § 784.

² *Knight v. Gould*, 2 My. & K. 295, 299.

³ *In re Gibson's Trusts*, 2 Jo. &

Hem. 656, 672. See *post*, § 643, as to bequests to executors.

⁴ *Wigg v. Wigg*, 1 Atk. 382; *Hills v. Worley*, 2 Atk. 605; *Oak v. Heath*, 1 Ves. 135; *Arrowsmith's Trusts*, 6 Jur. 1231, 29 L. J. Ch. 774; *Cady v. Cady*, 67 Miss. (1889), 425, 431.

⁵ See cases, § 331.

is only payable, if at all, upon a contingency to the legatee himself, without words of substitution, it will lapse, and in such case will be absorbed into the land devised for the benefit of the devisee.¹ But where a legacy which is charged upon land is given in terms that vest it absolutely in the legatee at the death of the testator, the mere fact that its payment is deferred is not enough, according to the modern cases, to cause a lapse in case the primary legatee shall die before the day of payment arrives. The postponement of payment, when it is for the convenience of the estate, will not prevent the legacy from being vested; and if the legatee dies *after* the death of the testator, but *prior to the time for the payment of the legacy*, the amount of the legacy ought to be paid to his personal representatives.² But the English cases, particularly those of an early date, held that the legacy, though vested, would lapse by the death of the legatee where it was charged upon real estate, and that it would be absorbed into the land for the benefit of the heir.³

¹ Attorney-General v. Milner (1744), 3 Atk. 112, 115; In re Cooper's Trusts, 23 L. J. Ch. 25, 81, 4 D. M. & G. 757, 765; Croft v. Slee, 4 Ves. (1798), 60, 63. "The law, of the court is settled, agreeably to reason and good sense, that where a landed estate is given by will to one set of persons, or for the purposes of one set of limitations, but is subject, by the will, to a pecuniary charge for the benefit of other interests, and those other interests given by the will do not exhaust the entire property in the money, the benefit of the charge, as far as it is not given away, sinks for the benefit of those to whom the real estate is devised subject to the charge. This, I presume, no one will dispute." By Bruce, L. J., in Cooper's Trusts, 23 L. J. Ch. 25, on p. 31. See also, as sustaining this proposition, Powers v. Ebelhoff, 56 Ill. App. 606; Cooke v. Stationers Co., 3 My. & K. 262, 264; King v. Dennison, 1 Ves. & Bea. 260, 272; Henchman v. Attorney-General, 3 My. & K. 485, 493, and other cases cited *post*, § 404,

where also the distinction between the extinguishment of a charge on land and a devise of land in trust to pay legacies is pointed out.

² Pond v. Allen, 15 R. L. 171, 178, 2 Atl. Rep. 302; Rogers v. Rogers, 11 R. L. 88, 73-76; Doe v. Considine, 6 Wall. (78 U. S., 1867), 458; Herbert v. Post, 26 N. J. Eq. 278; Loder v. Hatfield, 71 N. Y. 92; Eldridge v. Eldridge, 9 Cush. (63 Mass., 1851), 516, 519.

³ Poulet v. Poulet, 1 Vern. 204; Smith v. Smith, 2 Vern. 92; Jennings v. Looke, 2 P. Williams, 276; Duke of Chandos v. Talbot, 2 id. 601, 610; Prowse v. Abingdon, 1 Atk. 432; Parker v. Hodgson, 1 Drew. & S. 568. See on this subject, generally, the remarks of Chancellor Walworth in Birdsall v. Hewlett, 1 Paige (N. Y.), 32: "It is undoubtedly a general rule that legacies charged upon the real estate and payable at a future day are not vested and become lapsed if the legatee dies before the time of payment arrives. This rule was at first adopted without any exception, and in direct opposition to that which

§ 329. **The rule of lapse in the case of gifts to creditors.** The English courts have held that a division by the testator of his estate by will among his creditors under a composition deed would not lapse by the death of a creditor during the life-time of the testator, as the gift is not a bounty, but an attempt to pay debts which are due. Such actions ought to be encouraged.¹ In these cases the debtor had not been released from his indebtedness. If he had been released under the composition deed, his directions that his creditors should be paid in full might be regarded solely as bounty and as legatory in their nature rather than as payment of debts,² though even then, where a testator, having been discharged in bankruptcy, directed his creditors to be paid in full, the court, seeing clearly that he intended to perform a duty morally though not legally incumbent upon him, would not permit a lapse in case of a creditor who had died before the testator.³

§ 330. **Lapse in the case of directions releasing debts which are due the testator.**—A direction by the testator that a debt due him is to be forgiven or released by his executors is regarded in law as a legacy of that amount to the debtor, and will, aside from statute, lapse upon the same principles that are applicable to legacies.⁴ Thus, where the testator directs a bond or a security for the payment of money to be given up to the obligor by his executor, it does not always amount to an *absolute release of the debt*, though he may, at the same time, direct his executors to cancel it and give a full release. If the obligor has died before the testator the rule of lapse applies, and the security may be enforced against his personal representatives.⁵

existed in relation to legacies payable out of the personal estate. This was done for the benefit of the heir at law, who was a particular favorite of the English courts. I am not aware that it has ever been extended to a case where the estate was given to a stranger upon the express condition that he paid the legacy charged thereon; and the rule has long since been much narrowed down, even as between the legatees and the heir at law."

¹ Phillips v. Phillips, 3 Hare (1844),

281, 288; Williamson v. Naylor, 3 Younge & C. 208.

² Coppin v. Coppin, 2 P. Wms. 291, 295; Golds v. Greenfield, 2 Smale & G. 476, 479 (1864).

³ In re Sowerby's Trust, 2 K. & J. 620, 630; Turner v. Martin, 7 De Gex, M. & G. 429.

⁴ Post, § 452.

⁵ Izon v. Butler, 2 Price (1815), 34, 42, 43, where the direction was, "I remit and forgive, etc., and I direct the bond to be delivered up and canceled;" Elliot v. Davenport, 1 Peere

On the other hand, if the testator directs that the bond in which he is the obligee *shall be canceled*, his direction is imperative. It is not a legacy to the debtor, and the representatives of the debtor may have the benefit of it.¹

§ 331. The prevention of the lapsing of a legacy.—The legacy may be prevented from lapsing upon the death of the legatee before the testator, if such appears to have been the intention of the latter. This intention must appear upon the face of the will, and can never be proved by parol; and the testator must declare his intention in *an unequivocal manner, by designating what person or persons he wishes to take the legacy in case of the death of the primary legatee.*² No mere direction that a legacy or a devise shall *not lapse* will prevent the operation of the rule of lapse unless the testator points out whom he desires to substitute as legatee in the place of the deceased.³

If, however, the testator makes an unconditional disposition over upon the death of the primary legatee or devisee, or if he expressly provides that in case the legatee is not living then his legacy is to go to others, as where he gives a legacy to A., and in case of his death before the testator to his heirs,⁴ or to his administrator or personal representatives,⁵ the testamentary gift does not lapse, but becomes vested in the persons who are thus designated.⁶ A provision that, if a legatee shall die before reaching the age of twenty-one, and without issue, the property shall go to another person, who was also to have control

Wms. (1705), 83, 85 (a direction "to give up and release a bond"); 2 Vernon, 521; Maitland v. Adair, 8 Ves. Jr. 231, 232 ("I also return him his bond which he owes me").

¹ Sibthorp v. Moxom, 3 Atk. 580; Wilmot v. Woodhouse, 4 Brown, 230. "I give A. \$400 he owes me and order his bond to be delivered." Toplis v. Baker, 2 Cox, 118.

² See *post*, § 341 et seq.

³ Borgner v. Brown, 133 Ind. (1892), 391, 396; Appeal v. Hutchinson, 34 Conn. 300, 304; Capron v. Capron, 6 Mackey (D. C., 1887), 340; Goddard v. May, 109 Mass. 468, 471; Prescott v. Prescott, 7 Met. (Mass., 1843), 141,

145; Carpenter v. Heard, 14 Pick. (Mass.) 449, 452-460; Kimball v. Story, 108 Mass. 882, 884; Craighead v. Given, 10 S. & R. (Pa., 1823), 351; Dickinson v. Purvis, 8 S. & R. (Pa., 1822), 71.

⁴ Capron v. Capron, 6 Mackey, 340; Ruggles v. Randall, 70 Conn. 44, 38 Atl. R. 885, 887.

⁵ Long v. Watkinson, 17 Beav. 471; Hewitson v. Todhunter, 23 L. J. Ch. 76.

⁶ Maxwell v. Featherston, 88 Ind. 839; West v. West, 89 Ind. 529; Stevenson v. Fox, 125 Pa. St. 68; Church v. Church, 15 R. I. 133, 139; Dunlap v. Dunlap, 4 Des. (S. C., 1812), 305, 815. See also *post*, § 342.

of it in the event of the death of the first beneficiary leaving issue who were not of age at the death of their parent, and was to deliver it to the issue on their coming of age, sufficiently manifests an intention to exempt the legacy from lapse. Accordingly, where the legatee died before the testator, but after attaining his majority and leaving issue, his issue take by substitution in place of the parent.¹ So where the testator, on learning of the death of legatees, inserted the words "or to their heirs," before a list of legatees' names in his will, and added "deceased" after the names of those who were dead, and then republished his will, it was held that the legacies did not lapse, as the language, particularly the word "or," clearly signified, when taken in connection with all the circumstances of the case, an intention to substitute the heirs for the ancestors, whom the testator knew were dead when he republished his will.²

§ 332. **The effect of words of limitation in case of lapse — Gifts to A. and his heirs.**— The rule of lapse is, in the absence of statute, applicable to all testamentary dispositions, whether consisting of real or personal property. And though the testator may, by appropriate language used in connection with the gift, prevent it from lapsing, he must do so expressly and in clear terms that will manifest his intention unmistakably. It is very well settled that the mere addition of words of succession or representation to the name of the legatee, with or without the collocation of the words "and" or "or," is never *sufficient alone* to save the legacy and to prevent the operation of the rule of lapse.³

Thus, a devise of lands to "A. *and his heirs*,"⁴ or to A. *or* "his heirs,"⁵ or a legacy to A. "*and his heirs*," is not prevented from lapsing by the addition of the words "and his heirs," where

¹ *Rivers v. Rivers*, 86 S. C. 302, 309, (1705), 83, 85; *Wynn v. Wynn*, 3 Bro. 15 S. E. R. 137. P. C. C. 161, 163.

² *In re Gilmor's Estate*, 154 Pa. St. 523, 26 Atl. R. 614, 32 W. N. C. 272, distinguishing *Sloan v. Hanse*, 2 Rawle, 28, and *Barnett's Appeal*, 104 Pa. St. 342. ⁴ *Dickinson v. Purvis*, 8 S. & R. (Pa., 1822), 71; *Kimball v. Chappell*, 18 N. Y. S. 30; *Hawn v. Banks*, 4 Edw. Ch. (N. Y.) 664.

⁵ *Weishaupt v. Brehman*, 5 Binn. 3 Brett's Case, Plowd. (1559), 340; (Pa., 1813), 115; *Sloan v. Hanse*, 2 Elliott v. Davenport, 1 P. Wms. Rawle (Pa., 1820), 28.

A. dies prior to the testator.¹ The words "*and his heirs*" are regarded as words of limitation, not of substitution, pointing out the character of the interest (that is, a fee-simple) which the testator intended that the beneficiary is to take in the event of his surviving him. So, also, the words "and his heirs," though inappropriate to a legacy of personalty, as in a bequest to "A. and his heirs," are taken as words of limitation, showing that it was the intention of the testator that A., if he survive, should have *an absolute interest in the personal property given.*²

Another class of cases comprises those where the devise or bequest is to A. "and his heirs *and assigns*," or to A. "or his heirs and *assigns*." The presumption that the testator did not intend to prevent a lapse is strengthened by the addition of the word "assigns," as in the case of a gift to A. and his heirs and assigns, or to A. or his heirs and assigns.³ The added words of succession merely indicate that A. is to take an absolute interest. A gift to A. and "his personal representatives," or to a class of persons and their personal representatives, is not prevented from lapsing by the addition of the words "personal representatives," for these words, like "heirs," etc., are only used to show the nature of the estate devised. They are not words of purchase, giving a right to the personal representatives to take by purchase under the will.⁴ Thus, even where a legacy is given to A. and "to his representatives, *if he should*

¹ See the case of *Wynn v. Wynn*, 1 Bro. P. C. C. (1725), 161, 163, where the gift was to A. and "the heirs male of his body." See also *Davis v. Taul*, 6 Dana (Ky., 1837), 51, 52; *Wood v. Seaver*, 158 Mass. 411, 412, 33 N. E. R. 587; *Bryson v. Holbrook*, 159 Mass. 280, 281, 84 N. E. R. 270; *Kimball v. Story*, 108 Mass. 382, 385; *Horton v. Earle*, 162 Mass. 448, 450, 88 N. E. R. 1136; *Ballard v. Ballard*, 18 Pick. (Mass.) 41; *Hand v. Marcy*, 28 N. J. Eq. 59, 63; *Sword v. Adams*, 3 Yeates (Pa., 1800), 84, 86.

² *Wood v. Seaver*, *supra*; *Norwood v. Mills*, 1 Ohio (N. P.), 314.

³ *Sibley v. Cook*, 3 Atk. 572; *Walton's Case*, 8 D. M. & G. 173; *Hopkins'*

Trusts, 2 H. & M. 411; *Dawes' Trusts*, L. R. 4 Ch. Div. 210; *Church v. Church*, 15 R. L. 138, 23 Atl. R. 302; *Horton v. Earle*, 162 Mass. 444, 83 N. E. R. 1136; *Keniston v. Adams*, 89 Me. 290, 296; *Comfort v. Mather*, 2 Watts & S. (Pa.) 450; *In re Wells*, 113 N. Y. 396, 21 N. E. R. 137; *Armstrong v. Moran*, 1 Bradf. (N. Y., 1850), 314, 316; *In re Horner's Estate*, 24 Pitts. L. J. 386. So a gift to A., "his representatives and assigns," will lapse upon the death of A. before the death of the testator. *Maybank v. Brooks*, 1 B. C. C. 84.

⁴ See *post*, §§ 634, 639, as to the character of these terms as words of purchase.

die before the day" of payment, the words and "to his representatives" are mere surplusage, giving nothing to the representatives.¹

Independently of statute, the use of the word "heirs" is necessary to pass the fee. This rule has been abolished by statute in many of the states. But it has been held that though the word "heirs" is no longer necessary to pass the fee, its superfluous use in a devise of the fee does not make it a word of purchase and substitution so as to prevent a lapse.² But some of the cases hold that the use of words of representation with the word "*or*," *in the disjunctive*, favors an intention to exempt the devise from the application of the rule of lapse, though there is no gift over, in the case of the death of the primary devisee in the life-time of the testator.³

§ 333. The rule of lapse upon the failure of gifts upon a double contingency — Substitution of "and" for "or."— Where the testator devises land to A. and his heirs and assigns, but *in case A. shall die without issue and under the age of twenty-one*, then to an ulterior devisee, A. takes a fee-simple estate which is defeasible, but which becomes absolute either *upon his attaining the age of twenty-one*, or *on his death under that age leaving issue him surviving*. Both events must concur to produce a lapse. Hence, if he shall die *after* he has reached his majority, or under his majority leaving issue, though in either

¹ Bone v. Cooke, 13 Price (1824), 332, 347; Corbyn v. French, 4 Ves. 419, 436. And this rule of lapse is applicable to the representatives whether the legacy is payable at the death of the testator or after the expiration of a precedent life estate, if the legatee dies before the testator. In the early case of Goodright v. Wright, 1 P. W. (1717), 397, a devise to A. and his issue, remainder to B. and his issue, where A. died without issue, and B. died during the life of the testator leaving issue, which issue was also the heir of A., it was held that the issue could neither take under the will nor as heirs of A. The gift to B. lapsed.

² Thurber v. Chambers, 66 N. Y. 42;

Gill v. Brower, 37 N. Y. 549; Mount v. Mount, 3 N. Y. S. 190, 191.

³ Hand v. Marcy, 28 N. J. Eq. (1877), 59, 62-64; Brokaw v. Hudson, 57 N. J. Eq. (1895), 135; Keniston v. Adams, 80 Me. 290, 295; Kimball v. Story, 108 Mass. 332, 335; Wright v. Trustees, Hoffm. Ch. (N. Y., 1839), 202; Gittings v. McDermott, 2 M. & Kea. 69; Shuttleworth v. Greaves, 4 My. & Cr. 35; Porter's Trust, 4 K. & J. 188; Heyward v. Heyward, 7 Rich. Eq. (S. C.) 289. Of course, in the case of a devise to A. for life, with a remainder to his heirs, no lapse occurs upon the death of A. during the life-time of the testator, as the word "heirs" is a word of purchase, not of limitation. Brice v. Horner (Tenn.), 33 S. W. R. 440; *post*, §§ 606, 607.

case during the life-time of the testator, the devise does not lapse, but the issue take by substitution in place of their parent. And the same result follows where the devise is to A., his heirs and assigns, but in case he shall die without issue *or* under twenty-one, then over, for the word "*or*" in this latter devise will be read "*and*," and the devise over will not take effect unless both events concur; that is to say, unless A. shall die *under twenty-one and shall leave no issue*. The evident intention present in such devises is that A., the devisee, shall become absolutely vested with the fee upon his reaching the age which will give him the capacity of disposing of the property if he desires to do so. This may be called the primary intention of the testator. There is a secondary intention as well. The testator wishes to benefit the issue of A. If A. shall attain the age of twenty-one, *subsequently* marry and have issue, the fee-simple is in his complete control, as the testator intended that it should be, and he may devise it to his issue; while if he does not alien or devise it, the law will cause it to descend to them, if they survive him, in this way carrying out the complete intention of the testator. If, on the other hand, A. marries and dies before reaching his majority, leaving issue, the devisee over ought not to take to the deprivation of the issue whom the testator clearly intended to benefit in such an event, and for this reason, *i. e.*, to protect the interests of the issue, the word "*or*" is read "*and*," resulting in the defeasance of the remainder or executory devise over, unless the double contingency of the death of the primary devisee under the age of twenty-one *and* also without issue shall occur.¹

§ 334. The death of a legatee subsequent to the death of the testator.—The rule of lapse is not applicable to a case of

¹ Kindig v. Smith, 39 Ill. 300, 305; Chaplin, 1 Hill (S. C., 1833), Eq. 265; Sayward v. Sayward, 7 Me. (1831), 175, 181; Watkins v. Sears, 3 Gill (Md., 1845), 492, 496; Newton v. Griffith, 1 Har. & Gill (Md., 1827), 11; Raberg v. Hammond, 2 Har. & J. (Md.) 42, 54; Dallam v. Dallam, 7 Har. & J. (Md., 1826), 220; Hunt v. Hunt, 11 Met. (Mass.) 88; Jackson v. Blanshan, 6 Johns. (N. Y.) 54; Anderson v. Jackson, 16 id. 382; Hauer v. Schutz, 2 Binn. (Pa.) 532; Adams v. Barksdale v. Edwards, 2 Hill (S. C.), 184; Brewer v. Opie, 1 Call (Va., 1798), 184, 185; Broaders v. Turner, 5 Rand. (Va.) 273; Arnold v. Buffum, 2 Mason C. C. 208; Waller v. Ward, 2 Speer's Law (S. C., 1844), 786, 799; Ray v. Enslin, 2 Mass. 554; Scanlan v. Porter, 1 Bailey Law (S. C., 1830), 427, 428. And, see also other cases cited in § 366, *post*.

the death of a legatee *after the death of the testator*. If the legacy has vested in the legatee, and he is to receive more than an estate for his life, the interest will not lapse upon his death, though that event may take place before the interest has become vested in possession. Thus, where a person is to take an estate in remainder in fee after the termination of a prior life estate in another, and the remainderman dies before the termination of the life estate, but *after the death of the testator*, his interest descends to his heirs or executor according as the gift is real or personal property.¹

§ 335. **The destination and disposition of testamentary gifts which lapse**—The rule as to land acquired after the execution of will.—The common law made a distinction as to the ultimate destination of the property attempted to be disposed of by will between a devise of land which lapsed and a bequest of personal estate. Where a devise of land failed because of lapse or because it was void *ab initio*, the property was not comprised in a general or residuary devise, but devolved on the heir as real property of which the deceased was intestate.² This rule was a result of the common-law theory of a devise, by which it was regarded as a conveyance of real property of the date of the execution of the will, and the rule that after-acquired lands did not pass under the will.³ Such being the case, it becomes necessary to consider the effect, if any, of the modern statutes now universally existing, which

¹ Yeaton v. Roberts, 28 N. H. 459; Cotton v. Burkellman, 21 N. Y. Supp. 628, 2 Misc. R. 165; Martin v. Lachasse, 47 Mo. 914; Saxton v. Webber, 83 Wis. 617, 53 N. W. R. 617; In re Hedger's Estate, 9 N. Y. Supp. 347; Cook v. Hayward (Mass.), 51 N. E. R. 1075; Ruffin v. Farmer, 72 Ill. 615; *post*, § 349.

² Green v. Dennis (1826), 6 Conn. 293, 304; Remington v. Bible Society, 44 Conn. 512, 515; Beers v. Narramore, 61 Conn. 13, 22 Atl. R. 106; Gill v. Mining Co., 92 Ill. (1879), 249; Cunningham v. Cunningham, 18 B. Mon. (Ky., 1857), 19, 22; Ligan v. Carroll, 8 Har. & McH. (Md., 1796), 338; Heald v. Heald, 56 Md. 300; Cox

v. Harris, 17 Md. 23; Hays v. Wright, 48 Md. 122; Carpenter v. Heard, 14 Pick. (31 Mass.) 449; Hodson v. Gray, 58 Miss. (1881), 532; Van Kleeck v. Church, 20 Wend. (N. Y.) 427; Dougart's Suc., 30 La. Ann. 268; Appeal of Missionary Society, 30 Pa. St. 425; Murray v. Yard, 86 Pa. St. 113; Kelly v. Nichols, 18 R. I. 62, 69, 25 Atl. R. 840; Moore v. Sanders, 15 S. C. 440; Stonestreet v. Doyle, 75 Va. 356; Milw. Home v. Becher, 87 Wis. 409, 414; Morris v. Underdown, Willes, 293; Watson v. Earl of Lincoln, Amb. 338, 339; Attorney-General v. Johnston, Amb. 580; Grovenor v. Hallum, Amb. 643, 645, 2 Mad. 81.

³ *Ante*, §§ 60-63.

provide in effect that every devise by which the testator shows an intention to devise all his real estate shall be construed to pass all the real estate to which he has title at the date of his death. The majority of the decisions hold that by such enactments devises of real property are placed upon precisely the same footing, so far as the operation of a general or residuary clause is concerned, as bequests of personal property. In the state of New York and elsewhere it has been expressly held under such a statute that a lapsed devise of real property becomes a part of the residuary estate, and passes in the same way as a lapsed legacy, unless a contrary intention is apparent in the residuary clause itself.¹ A legacy which lapsed or which was void devolved under the residuary clause of the will.²

¹ *Cruikshank v. Chase*, 21 N. E. R. 64, 118 N. Y. 337; *Smith v. Smith*, 141 N. Y. 29, 35 N. E. R. 1075; *Moffett v. Elmendorf* (N. Y.), 46 N. E. R. 845; *Holbrook v. McLeary*, 79 Ind. 167, 170; *Smith v. Curtis*, 29 N. J. L. 345; *Shreve v. Shreve*, 10 N. J. Eq. 385, 389; *Molineaux v. Raynolds* (N. J. Eq.), 36 Atl. R. 276; *Gallagher v. Rowan*, 86 Va. 823, 11 S. E. R. 121. But see also *Remington v. Society*, 44 Conn. 512, 517. So, too, on failure to perform a condition. *Rockwell v. Swift* (Conn.), 20 Atl. R. 200. A residuary clause carries land which has failed by reason of misdescription (*Eckford v. Eckford* (Iowa), 53 N. W. R. 345), or because void for indefiniteness (*In re Bonnet's Estate*, 113 N. Y. 523, 21 N. E. R. 139), or because the devisee, having the option, refuses to accept. *Beurhans v. Cole*, 94 Wis. 617, 629.

² *Pool v. Harrison*, 18 Ala. 515; *Roberson v. Roberson*, 21 Ala. 273; *Hughes v. Allen*, 81 Ga. 489; *Thweatt v. Redd*, 50 Ga. 181; *Adams v. Bass*, 18 Ga. 180, 141; *Crerar v. Williams*, 145 Ill. 625, 44 Ill. App. 497; *Cunningham v. Cunningham*, 18 B. Mon. (Ky.) 19, 22; *Gare v. Stevens*, 1 Dana (Ky.), 201, 205; *Chapman v. Chick*, 81 Me. 109, 117, 16 Atl. R. 407; *Hamlin v. Mansfield*, 88 Me. 131; *Trippe v. Frazier*, 4 H. & J. (Md., 1819), 446; *Reid v. Walbach*, 75 Md. 205, 217, 23 Atl. R. 472; *Deford v. Deford*, 36 Md. 168; *Minot v. Baker*, 17 N. E. R. 339, 147 Mass. 348, 350; *Thayer v. Wellington*, 9 Allen (Mass.), 283, 295; *Hayden v. Stoughton*, 5 Pick. 528, 538; *Lombard v. Boyden*, 5 Allen, 249; *In re Batchelder*, 147 Mass. 463, 468, 18 N. E. R. 225; *Pollock v. Farnham*, 156 Mass. 388; *Tindall v. Tindall*, 24 N. J. Eq. 512; *Macknet v. Macknet*, 24 N. J. Eq. 277; *Sandford v. Blake*, 45 N. J. Eq. 247, 17 Atl. R. 812; *Vick v. McDaniel*, 1 How. (2 Miss.) 357; *Spofford v. Pearsall*, 56 Hun, 148, 9 N. Y. S. 36; *Palmer v. Durham*, 53 Hun, 637; *Tucker v. Tucker*, 5 N. Y. 409; *Kimball v. Chappell*, 18 N. Y. S. 30, 27 Abb. N. C. 437; *Henderson v. Henderson*, 46 Hun, 509; *In re Bonnet*, 46 Hun, 529; *Lamb v. Forsyth*, 131 N. Y. 227, 30 N. E. R. 133; *Tompkins' Will*, 154 N. Y. 634; *In re Arden's Will*, 1 Con. Sur. 159, 4 N. Y. S. 177; *Howard's Estate*, 3 Misc. R. 170, 176; *Carter v. Board of Education*, 144 N. Y. 621, 39 N. E. R. 628; *In re Benson*, 96 N. Y. 499; *Riker v. Cromwell*, 113 N. Y. 115; *Lindsay v. Pleasants*, 4 Ired. Eq. (N. C.) 320; *Taylor v. Lucas*, 4 Hawkes (N. C.),

§ 336. The disposition of property comprised in a lapsed residue.—Where a lapse takes place in a gift of the residue either because the sole residuary beneficiary has predeceased the testator, or because one of several residuary beneficiaries who *take as tenants in common* have died before him, the gift which lapses is not re-absorbed into the residue, but goes as intestate property, either to the heirs or the next of kin of the testator, according to the nature of the property.¹ This rule

215; *Davis v. King*, 2 Ired. Ch. (N. C.) 203; *Powell v. Slocomb*, 2 Mur. (N. C.) 326; *In re High's Estate*, 136 Pa. St. 222, 20 Atl. Rep. 421; *In re Wengerd's Estate*, 143 Pa. St. 615, 22 Atl. R. 869, 28 W. N. C. 447; *Woolmer's Estate*, 3 Whart. (Pa.) 477; *Missionary Society's Appeal*, 30 Pa. St. 425; *Peckham v. Newton*, 4 Atl. R. 758, 15 R. L. 321; *Gallagher v. Rowan*, 36 Va. 823, 11 S. E. R. 121; *Renton's Estate*, 10 Wash. 533, 39 Pac. R. 145; *Fisk v. Attorney-General*, L. R. 4 Eq. 521; *Hoare v. Osborne*, L. R. 1 Eq. 585; *Cambridge v. Rous*, 8 Ves. 12, 25; *Bland v. Lamb*, 2 Jac. & W. 406; *Roberts v. Cooke*, 16 Ves. 451; *Smith v. Fitzgerald*, 3 V. & B. 2; *Durour v. Motteux*, 1 Ves. Sen. 321; *Page v. Leap- ingwell*, 18 Ves. 463; *Brown v. Higgs*, 4 Ves. 708. The testator may by the use of appropriate words prevent the operation of the rule that all personal property which he has attempted to dispose of in his will, but which has lapsed, is carried to the residuary legatee by a general residuary clause. His intention to exclude any portion of his estate from the operation of the residuary clause must be clearly manifested. A gift of a residue of a particular fund does not include any lapsed bequests. *Kerr v. Dougherty*, 79 N. Y. 346; *Beekman v. Bonsor*, 23 id. 298-312; *Riker v. Cornwell*, 113 id. 125, 126.

¹ *Hamlet v. Johnson*, 26 Ala. 557; *Hutchinson's Appeal*, 34 Conn. 300, 305; *Wentworth v. Read*, 166 Ill. 139; *Stetson v. Eastman*, 24 Atl. R. 868,

84 Me. 366; *Morse v. Hayden*, 82 Me. 227, 19 Atl. R. 443; *Merrill v. Hayden*, 86 Me. 133, 135; *Elliott v. Fessenden*, 83 Me. 197, 204; *Powers v. Godwise* (Mass.), 53 N. E. R. 525; *Sohier v. Inches*, 12 Gray (Mass., 1859), 885, 387; *Lombard v. Boyden*, 5 Allen (Mass.), 249, 251; *State v. Holmes* (Mich., 1898), 73 N. W. R. 548; *Garthwaite v. Lewis*, 25 N. J. Eq. 351, 353; *Hand v. Marcy*, 28 N. J. Eq. 59; *Mount v. Mount*, 3 N. Y. S. 190, 192; *Kerr v. Dougherty*, 79 N. Y. 327, 349; *Floyd v. Carew*, 88 N. Y. 570; *Floyd v. Barker*, 1 Paige (N. Y., 1829), 480, 481; *De Peyster v. Clendinning*, 8 Paige (N. Y.), 295; *Howland v. Clendenin*, 134 N. Y. 305, 31 N. E. R. 305; *Booth v. Baptist Church*, 126 N. Y. 215, 245, 28 N. E. R. 238; *Craighead v. Given*, 10 S. & R. (Pa.) 351; *Reed's Estate*, 82 Pa. St. 428, 431; *Williams v. Neff*, 52 Pa. St. (1852), 326, 337; *In re Gorgas*, 166 Pa. St. 269, 31 Atl. R. 86; *Appeal of Vaux*, 156 Pa. St. 194; *Gray's Estate*, 147 id. 67; *Van Beuren v. Dash*, 30 N. Y. 393; *Downing v. Marshall*, 23 N. Y. 366, 373; *Hart v. Marks*, 4 Bradf. 161; *Church v. Church*, 15 R. L. 138, 23 Atl. R. 302; *In re Kimball* (R. L., 1898), 40 Atl. R. 847; *Frazier v. Frazier*, 2 Leigh (Va., 1841), 642, 649; *House v. Davidson* (Tex., 1897), 39 S. W. R. 924; *Wisner v. Barnet*, 4 Wash. C. C. 631; *Leake v. Robinson*, 2 Mer. 393; *Doe v. Scott*, 3 M. & S. 800; *Bagwell v. Dry*, 1 P. W. 700; *Page v. Page*, 2 P. W. 489; *Skrymsher v. Northcote*, 1 Sw. 566; *Humble v. Shaw*, 7 Hare, 247; *Man v. Man*, 2

does not apply to a residue which is given in language which creates a joint tenancy among the residuary legatees, and *a fortiori* where the residuary gift is to several who are to take as members of a class, to be ascertained at the death of the testator.¹

§ 337. **Statutory provisions regulating lapse.**—The provisions of the English statute modifying the common-law rule of lapse are as follows:² “That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the life-time of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.”³ “That where any person to whom any real estate shall be devised for an estate tail, or an estate in *quasi* entail, shall die in the life-time of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear in the will.”⁴ “That where a person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any interest not determinable at or before the death of such person, shall die in the life-time of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the

Stra. 905; *Lightfoot v. Burstall*, 33 L. J. Ch. 188; *Hoare v. Osborne*, 33 id. 586; *In re Chaplin's Trusts*, 33 id. 183; *Peacock v. Peacock*, 34 L. J. Ch. 315; *Bullock v. Bennell*, 24 L. J. Ch. 512. Where the testator gave several money legacies to legatees by name and a gift of all the residuary estate among these legatees as tenants in common, and one died, the specific legacy lapsed into the resid-

uum, but the legatees' share of the latter went to the next of kin. *Craighead v. Given*, 10 S. & R. 351.

¹*Smith v. Cortis*, 5 Dutch. (N. J.) 345; *Cross' Estate*, 10 Pa. St. 360; *In re Gardner*, 35 N. E. R. 489, 140 N. Y. 122; *Gorgas' Estate*, 166 Pa. St. 269, 31 Atl. R. 86.

²1 Vict. 26, sec. 25.

³Sec. 32.

⁴Sec. 33.

will." Statutes nearly similar in their character have been enacted in many of the states of the American Union.

§ 338. The meaning of the words "descendants" and "relations" as used in the statutes.—In many cases statutes provide that a legacy or a devise shall not lapse if the beneficiary shall leave "descendants." By this is meant lineal descendants, *i. e.*, issue;¹ but in no case including collateral kindred.² An illegitimate child of a female legatee may take under such a statute, as he is a descendant.³ So, also, where by statute an adopted child occupies the *status* of one born to the adopting parent,⁴ he will be regarded as a lineal descendant, and will take a legacy given to his parent by adoption.⁵ Construing the word "relative," in a statute exempting from the application of the doctrine of lapse a bequest or a devise to a "relative," the courts hold that a relative means one who is such by blood,⁶ and not one who is connected with the testator by marriage only.⁷ A husband,⁸ a wife,⁹ a brother¹⁰ or sister-in-law¹¹ or a step-grandchild,¹² is not a relative in the meaning of the statute. But a cousin or nephew by consanguinity is.¹³ In construing the statutes it is not material that the legacy is not to the descendant or relative *nominatim*, but to

¹ *Morse v. Hayden*, 82 Me. 227.

² *West v. West*, 89 Ind. 529, 537, 19 Atl. R. 448; *Armstrong v. Moran*, 1 Bradf. (N. Y., 1850), 314, 320; *West v. West*, 89 Ind. 529, 531; *Gray v. Bailey*, 42 Ind. 349; *Holbrook v. McCleary*, 79 Ind. 167; *Prather v. Prather*, 58 Ind. 141; *Van Gieson v. Howard*, 7 N. J. Eq. 462, 463; *Fisher v. Hill*, 7 Mass. 86, 87.

³ *Goodwin v. Colby*, 18 Atl. R. 868, 64 N. H. 706 (Laws N. H., ch. 193, sec. 12).

⁴ *Post*, § 550.

⁵ *Warren v. Prescott*, 24 Atl. R. 948, 84 Me. 483 (R. S., ch. 74, sec. 10). *Contra*, *Phillips v. McConica*, 59 Ohio St. 1, 51 N. E. R. 445.

⁶ See *post*, § 590.

⁷ *Elliott v. Fessenden*, 88 Me. 197, 205, 22 Atl. R. 115 (R. S., ch. 74, § 10); *Paine v. Prentiss*, 5 Met. (Mass.) 396; *Dickinson v. Parris*, 8 Ser. & R. (Pa.)

71. So, too, a widow is not an *heir*

within the meaning of a statute providing that where a devisee dies before the testator the devise shall be inherited by his heirs. *Blackman v. Wadsworth*, 65 Iowa, 80, 83, 21 N. W. R. 190; *McMenamy v. McMenamy*, 22 Iowa, 184.

⁸ *Keniston v. Adams*, 80 Me. 290, 295, 14 Atl. R. 293.

⁹ *In re Renton's Estate*, 10 Wash. 533, 39 Pac. R. 145. And see *Esty v. Clark*, 101 Mass. 36, 88; *Kimball v. Story*, 108 Mass. 882, 885, as to stepson.

¹⁰ *Horton v. Earle*, 38 N. E. R. 1135, 162 Mass. 448, 449 (R. S., ch. 127, sec. 23).

¹¹ *Mann v. Hyde* (Mich., 1838), 39 N. W. R. 78.

¹² *Bramell v. Adams* (Mo., 1898), 47 S. W. R. 931,

¹³ *Howland v. Slade*, 155 Mass. 415, 416.

him as one member of a class, as to "my cousins now living,"¹ "my nephews,"² or "my own brothers and sisters and those of my wife."³

§ 339. **The title of the heirs or issue who are substituted by the statutes.**—Where the common-law rule of lapse has been abolished by statute, so that the issue or heirs, descendants of a devisee, take his interest in case of his death before the testator, it becomes important to determine whether they take *by descent* from their ancestor or whether they take as purchasers under the will. The latter view is undoubtedly the correct one, although the question has rarely been litigated. The heirs or issue of the deceased legatee or devisee must, of necessity, take under the will, as, because of the death of the ancestor *before the testator*, no estate had ever vested in the former, and the plain intention of the statute is to do for the forgetful testator what in most cases he would have done for himself if his attention had been called to the necessity for it, *i. e.*, provide for a gift over to others by substitution in the case of the death of the primary beneficiary during the testator's life-time.⁴ Hence the issue take the benefit under the will subject to the same liabilities for the debts of the testator as other legatees. Nor can they be deprived of what they are thus entitled to by any action upon the part of their ancestor. His expectations under the will are not assignable nor devisable, nor is their share liable for his debts.⁵ The plain intent of these statutes was to benefit the issue because of the apparent hardship of depriving them of the benefit of which they would be deprived by the death of the legatee in the life-time of the testator. To construe the statute as permitting the primary legatee to alienate by will or conveyance what he expects to receive under the will of the testator would place the issue in a worse position than before. They are to take as though the devisee had survived the testator, but they alone can take, and not a devisee or assignee of their ancestor.⁶

¹ Howland v. Slade, 155 Mass. 415, 416; *post*, § 603.

² Moses v. Allen, 81 Me. 268, 17 Atl. R. 66; *post*, § 595.

³ Strong v. Smith, 84 Mich. 567, 48 N. W. R. 183 (Stat. Mich., sec. 812). See *post*, § 599.

⁴ Thompson v. Myers, 95 Ky. 597, 26 S. W. R. 1014.

⁵ Suydam v. Voorhis (N. J., 1899), 43 Atl. R. 4.

⁶ Newbold v. Pritchett, 2 Whart. (Pa., 1836), 46, 49. See also *ante*, §§ 49-51.

§ 340. The effect of the statute where the legatee is dead at the execution of the will.—The question sometimes arises as to the application and effect of a statute providing that a legacy shall not lapse in case of the death of the legatee during the life-time of the testator, where the legatee *is dead at the time of the execution of the will*. Some of the cases, proceeding upon the recognized distinction¹ between a bequest which is void *ab initio*, as in the case of a gift to one who is *dead when the will is made*, and a bequest which lapses because the devisee dies between the execution of the will and the death of the testator, refuse to apply the statute to give effect to devises and bequests void from the beginning.² But other cases give the statutes a more liberal construction, repudiating a technical distinction between void and lapsed devises which is not mentioned in the statutes. These cases hold that the intent and meaning of the statutes to give the issue of the legatee the benefit are clearly apparent, irrespective of *the reason for the failure of the devise*.³

¹ See 1 Jarman, 204, note; 4 Kent, Com. 542.

² Billingsley v. Tongue, 9 Md. 575; Young v. Robinson, 11 G. & J. (Md.) 328, 340; Williams v. Knight, 18 R. I. 333, 27 Atl. R. 210; Almy v. Jones, 17 R. I. 265; Lindsay v. Pleasants, 4 Ired. (N. C.) Eq. 320.

³ Nutter v. Vickery, 64 Ma. 190; Murphy v. McKeon, 53 N. J. Eq. 406, 412, 32 Atl. R. 374; Minter's Appeal, 40 Pa. St. 111, 115; Barnes v. Huson, 60 Barb. (N. Y.) 598; Jamison v. Hay, 46 Mo. 546, 553; Guitar v. Gordon, 17 Me. 408, 414; Winter v. Winter, 5 Hare, 806; Johnson v. Johnson, 3 id. 157; Mower v. Orr, 7 id. 473; Skinner v. Ogle, 4 Notes Cas. 74, 9 Jur. 432; Barkworth v. Young, 4 Drew. 1. Whether the statute is to operate to

preserve the gift for the heirs or next of kin of the beneficiary, where his death takes place *before its passage*, is a disputed question. The general rule is that statutes are to have a retrospective effect only when such clearly appears to have been the intention of the legislature. Hence it has been held that a statute providing that a legacy to a relative of the testator shall not lapse in the case of his death during the life of the testator does *not apply where the legatee died prior to the passage* of the act, though subsequent to the execution of the will. Murphy v. McKeon, 32 Atl. R. 374, 53 N. J. Eq. 406; Wild v. Reynolds, 5 N. Cas. 1; Winter v. Winter, 5 Hare, 306, 314; *ante*, §§ 17, 18.

CHAPTER XVI.

THE DEATH, SURVIVORSHIP AND SUBSTITUTION OF BENEFICIARIES.

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| <p>§ 341. General rules for construing words relating to survivorship and death of beneficiaries.</p> <p>342. The construction of the words "in case of death"—These words may mean death in the life-time of the testator.</p> <p>343. The construction of a gift over upon the death of a legatee before receiving his legacy.</p> <p>344. Gift over in case of the death of a legatee over before his legacy is payable.</p> <p>345. The meaning of the words "in case of death" coupled with a contingency.</p> <p>346. The meaning of the words "in case of death" with a contingency where the possession is postponed.</p> <p>347. When death without issue means death in the life-time of the testator.</p> <p>348. Exception to the rule that death without issue means</p> | <p>death in the life-time of the testator.</p> <p>§ 349. The period of survivorship—Words of survivorship referred to the death of the testator when possession is postponed.</p> <p>350. Cases in which words of survivorship have been referred to the period of a precedent interest where the possession is postponed.</p> <p>351. The primary meaning of the word "survivors"—When it is co-extensive in signification with "others."</p> <p>352. The disposition of accruing shares.</p> <p>353. Substitutional gifts—Interchangeability of the words "and" and "or."</p> <p>354. Substitutionary gifts where members of the class are dead at the date of the will.</p> <p>355. The contingent character of the substituted gifts.</p> |
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§ 341. General rules for construing words relating to survivorship and death of beneficiaries.—Testamentary language referring to the death or to the survivorship of beneficiaries, whether named as individuals or comprised in a class, presents some of the most difficult problems of construction. The layman who, without professional advice or assistance, drafts his own will in which are contained terms limiting over the property disposed of upon the death of a legatee, or disposing of property among survivors, or among the surviving members of a class, almost invariably fails to express his intention as regards the *time of survivorship*, or expresses it so

clumsily and inadequately that a suit to construe the will is required. And even the most skilful and experienced draughtsman is not always successful in avoiding uncertainty and ambiguity where he employs words of survivorship, unless he has clearly in his mind *the precise point of time to which the testator intends that they shall be referred*. Hence, as a preliminary to their insertion in a will, it is advisable, and perhaps indispensable, to ascertain whether the testator, in providing for a survivorship, intends a survivorship *at his death* or at some period *subsequent* or *prior* thereto. So, also, if the testator shall desire to provide for the disposition of the property he gives to a beneficiary in case of the death of that person, it is necessary to ascertain whether he means his death during his own life or subsequently thereto; and if the former period is in his mind, whether he means death before or after the execution of the will.¹ For in most cases the ideas of the testator on these points are extremely vague. The customary intention is to provide against an intestacy as to the share disposed of in case the beneficiary shall not live to enjoy it in person and to avoid a lapse. But this intention is usually so vaguely expressed that great difficulty is experienced in its ascertainment by the court.

§ 342. The construction of the words “in case of death”—These words may mean death in the life-time of the testator.—Where there is an immediate gift in the will to A., and a disposition of the property to another “*in case of his (A.’s) death*,” or “*in the event of his death*,” or with any similar expression referring to the death of A., not as an event which is *certain to occur*, but as a contingent event, no time being mentioned, the gift over will take effect only if A. shall *die during the life-time of the testator*.² So, also, where the gifts are im-

¹ See chapter on “Lapse.”

² *Johnes v. Beers*, 57 Conn. 295 (1889), 18 Atl. R. 100; *Jones v. Webb*, 5 Del. Ch. 132; *Borgner v. Brown*, 133 Ind. 391, 33 N. E. R. 92; *Patterson v. Earhart*, 29 Wkly. L. B. 313; *Wills v. Wills*, 85 Ky. 486 (1887), 3 S. W. R. 900; *Brown v. Lippincott*, 49 N. J. Eq. 944, 23 Atl. R. 497; *Kimble v. White*, 50 N. J. Eq. 88, 24 Atl. R. 400; *Teed v. Morton*, 60 N. Y. (1875), 506; *Hayward v. Barker*, 113 N. Y. 366, 21

N. E. R. 142; *Goodal v. McLean*, 2 Bradf. (N. Y.) 306; *Traver v. Schell*, 20 N. Y. 89; *In re Breese*, 13 Pa. Co. Ct. R. 184; *Green’s Estate*, 140 Pa. St. 253 (1891), 21 Atl. R. 317; *Weissinger’s Appeal* (Pa., 1888), 17 Atl. R. 222; *In re Durfee*, 17 R. L. 639, 24 Atl. R. 50; *Lord Bindon v. Earl of Suffolk*, 1 P. W. 96; *Hinckley v. Simmons*, 4 Ves. 160; *Trotter v. Williams*, Finch, Pre. Ch. 72; *Ommaney v. Bevan*, 18 Ves. 291; *Cambridge v. Rous*, 8 Ves. 12.

mediate to several individuals, and *in case of the death of any in the life-time of the others*, then over, those who survive the testator take at once absolutely.¹

In all these cases the testator has employed the words "*in case of death*," not as equivalent to "*at or after the death*," but as words of substitution, not of purchase. The testator did not intend to give a life interest with a remainder at or from the death of the legatee, but he intended to provide a gift by substitution in case of the death of the legatee before he received it and to avoid a lapse.² The devise or legacy being vested *immediately upon the death of the testator*, the death of the legatee *during his life* must, of necessity, be the event referred to. No other period can possibly be meant. In special cases exceptions to the rule are recognized. And where the death of the legatee can, from the character of the disposition which is made in case of death, be referred to another period than the life of the testator, the court will not hesitate so to construe it. Accordingly, where the gift to the primary beneficiary is after a life estate in express terms,³ or where a legacy is to vest in legatees *when they are twenty-one years of age*, and apparently where payment only and not vesting is postponed, with a gift over in case of the death of a legatee, the term will be taken to mean death at any time either *before or after* the death of the testator.⁴ And also, where the testator, after giving an executory gift to his sons, provided that, "*in the case of the death of any one of them*," *his* share was to go to his issue, and one son predeceased the testator, his issue were entitled,

¹ Howard v. Howard, 21 Beav. 550. And it is immaterial that the devise to A. is, in terms, *in the event of his death*, given to *his children*; for in such case A., if he survive the testator, will take absolutely and the children take nothing. Slade v. Milner, 4 Mad. 144; Schenk v. Agnew, 4 K. & J. 405; Webster v. Hale, 8 Ves. 411. The intention of the testator in these cases, where he disposes of property "*in case of the death*" of a beneficiary, is to prevent a lapse, and not to give him a life estate with a future gift to another. The devise

over is substitutional, and not substantive, independent and indefeasible.

² Ante, § 331.

³ Hervey v. M'Lauchlin, 1 Price, 264; Williamson v. Chamberlain, 10 N. J. Eq. 373; Beatty v. Montgomery, 21 N. J. Eq. 324; Hudgens v. Wilkins, 77 Ga. 555; Littlewood's Estate (Wis.), 71 N. W. R. 1047; In re Breese, 13 Pa. Co. Ct. R. 184, 32 W. N. C. 166; Johnson v. Antrobus, 21 Beav. 556; Bolitho v. Hilyar, 34 Beav. 180.

⁴ Chew v. Keller, 100 Mo. 362, 13 S. W. R. 395.

for the contingency of death will not be restrained to death during the existence of the prior estate after the death of the testator, unless such appears to have been the intention of the testator.¹

§ 343. **The construction of a gift over upon the death of a legatee before receiving his legacy.**—Clauses by which property is given to A. absolutely, with a limitation over in case A. shall *die before* receiving his legacy, primarily refer to his death before it is actually received by him in cash, whether he die *before or after* the death of the testator. Though A. may survive the testator, the legacy to him is contingent upon his surviving to receive it.² If the testator expressly directs that the legacy shall be paid at some particular point of future time,³ as five years from his death, or at the expiration of a life estate,⁴ with a gift over in case of the death of the legatee before receiving the legacy, it will vest at the *date when it ought to be received*, though its actual payment shall be delayed by the caprice or the wilfulness of the executor.

The difficulty in construing these limitations over is most striking when they depend upon death *simpliciter*, *without having received the legacy*, the testator having omitted all words which would indicate that he meant an *actual receipt*. In a recent case, where the testator provided that in the event of the death of a remainder-man "leaving issue *before receiving his share*, the

¹ *Le Jeune v. Le Jeune*, 2 Keen, 701. So in *Ewing v. Winters*, 84 W. Va. 23, 11 S. E. R. 718, to A., and in case of his death to his widow, then to his children, gives A. an estate for life only. Legatees who are to receive portions of the estate from time to time after the death of the testator, the issue of any "who may *hereafter* cease to receive the share the parent would take if living," take vested interests in the monies directed to be paid, subject to being divested by their death at any time *before payment*, when the issue of each deceased legatee take by substitution and as purchasers. The issue surviving the parent have a vested interest which is transmissible, though they do not

survive the period of payment. The issue of each legatee takes at his death as joint tenants, not as tenants in common. *Crane v. Bolles*, 49 N. J. Eq. 373 (1892), 24 Atl. R. 237. A gift of a remainder, "and, in case of the death of a devisee, *to his heirs*," means death before the life tenant, and until his death the remainder is wholly contingent. *Young v. Harkle-road*, 186 Ill. 319 (1897), 46 N. E. R. 1113. Cf. *Young v. Carpenter*, 109 Ind. 540, 10 N. E. R. 422.

² *Hoadley v. Wood* (Conn., 1897), 42 Atl. R. 263.

³ *In re Spencer*, 16 R. I. 25 (1887), 12 Atl. R. 124.

⁴ *Rammell v. Gillow*, 15 L. J. Ch. 35, 9 Jur. 704.

issue should take," it was held that a remainder-man *who survived the testator took a vested estate* at the death of the testator. Receiving here meant possession.¹ The same rule is applied where the will is silent as to the time of payment and the legacy is immediate. Thus, where a legacy is not expressly payable in the future, and the will provides a gift in case of the legatee's death before *receiving his share* of a residue,² or before the "*division*" of the estate,³ and the legatee survives for one year after the testator, which period is allowed by law for the settlement of the estate, the legacy is indefeasibly vested, though, if he die during the year, the gift over takes effect. The fact that the executor may, if he choose, pay the legacy *before the year expires* does not accelerate the vesting, for the executor cannot favor one legatee as against another. Until the year has elapsed the legacy is undoubtedly contingent. And it has been held that equity will not direct that inquiry shall be made into the circumstances of the estate in order to ascertain whether payment could have been made without inconvenience *before* the death of the legatee, or within one year from the death of the testator, even if the legatee has survived that period for several years.⁴

Cases which provide for a gift over in the event of the death of the legatee before he has *actually received* a legacy differ radically from those in which an *actual* receipt is *not* required. Where it is clearly apparent that the testator intended that the legatee should be at the risk of losing what he gave him through the delay or the caprice of the executor, or through accident, as in case it is expressly provided that if the legatee should die before he shall have "*actually received his legacy*" the part "*he has not actually received, whether payable or not,*" is to go to another, the intention must be respected.⁵ The gift over is not invalid for its uncertainty, merely because it is within the power of the executor to defeat the intention of the testator respecting it, by a prompt payment of the legacy, if it is clear that the testator intended he should possess that power.⁶ Whether the

¹ Cook v. McDowell, 53 N. J. Eq. 851 (1895), 80 Atl. R. 24.

⁴ Hutcheon v. Mannington, 1 Ves. Jr. 366.

² In re Arrowsmith, 29 L. J. Ch. 774, 80 L. J. Ch. 148, 6 Jur. (N. S.) 1232.

⁵ Johnson v. Crook, L. R. 12 Ch. Div. 639.

³ In re Collison, L. R. 12 Ch. D. 834.

⁶ Gaskell v. Harman, 11 Ves. 497;

executor shall possess this power depends upon the language of each will. Its existence must clearly appear, as nothing will be taken by implication in this respect.¹

But other cases, arguing from the equitable maxim that where trusts are concerned equity will consider that *as done which ought to have been done*, have declined to permit the refusal or delay of the executor to pay a legacy, when by law he should pay it, to prejudice the legatee, where the legacy is contingent upon his surviving until he shall actually receive it. If it is clearly apparent that the testator intends that the legatee shall take a vested legacy, and the date at which he is to receive it is not *expressly postponed*, it will not be presumed that he intended to make the vesting or divesting of the legacy depend upon the caprice of the executor, or upon accident, or his delay in acting. Assuming that the gift over, on death before actually receiving the legacy, is valid, it cannot be doubted that in the event of the death of the legatee before the actual receipt of the legacy, an inquiry may be had to ascertain if its non-receipt was due to the misconduct of the executor, or if it was the fault of the legatee himself.

§ 344. **Gift over in case of the death of a legatee before his legacy is payable.**—A direction that an immediate legacy shall go over, in case of the *death of the legatee before it shall be or become due and payable*, means death either in the life-time of the testator or within one year after his death. Where payment is postponed by the will, death before the *actual date of the vesting* of the legacy is intended, and the legacy is contingent until that date. But the failure or delay of the executor in making actual payment will not be allowed to divest a legacy which has vested. The cases which are above noted, construing the word “receivable,” are² applicable to the construction of the words “due and payable.” Where death before a legacy is due and payable may be referred to either of two periods, it will be referred to the earlier period in order to favor an early vesting. Thus, where money is bequeathed to A. for life, and after his death to B., to be paid to B. when he shall attain the age of twenty-one or marry; but if B. shall

Whitman v. Aitken, L. R. 2 Eq. 403, Minors v. Battison, L. R. 1 App. Cas. 414. 428, 432, 447, 453.

¹ Martin v. Martin, L. R. 2 Eq. 403; ² Ante, § 343.

die *before the legacy is paid to him*, then to C., the death of B. means his death during majority or before marriage. If, therefore, B. shall attain his majority, or shall marry *during the life of A.*, his legacy vests at once absolutely, and is not subsequently divested by his death before the death of A.¹ And where, in such a limitation, a survivorship is inserted on the death of any legatee to whom a legacy is to be paid at majority, those who survive him at that date take vested shares, which are subject to the same limitations as the original shares. On the other hand, where the gift is to those of a *class who may be living at the death of the life tenant*, to be paid at majority, death *before the legacy is payable* means death at any time during the life tenancy.²

Though the legatee shall attain his majority or marry during the life of the testator, his legacy will be defeated by his death before the testator, whether the benefit to him is immediate or after a life estate. If no statutory modification of the law of lapse has been made which is applicable to him, his legacy will lapse by his death, and will never be payable in any sense. A legatee to whom a legacy is payable at twenty-one must at least survive the testator.³ The word "vested" has two meanings. Its usual technical employment is to describe the ownership of property rather than the possession and enjoyment of it; but it is very frequently used in the latter sense. In the case of a future estate with a proviso for death before the same shall *vest*, death during the life-time of the testator exclusively is meant. Where the gift over is upon death, either before or after the death of the testator, and before the *estate shall vest*, the future gift being vested in interest at the death of the testator, vesting in possession is meant,⁴ and death *after* the testator, during the life tenancy, will let in the devisee over.⁵

§ 345. The meaning and effect of the words "in case of death" coupled with another contingency.—In a preceding section the construction of a limitation over "in case of death,"

¹ Jones v. Jones, 13 Sim. 561; Halifax v. Wilson, 16 Ves. 168; Haydon v. Rose, L. R. 10 Eq. 224; Salisbury v. Lambe, 1 Eden, 465.

² *Ante*, chapter on Lapse.

³ King v. Cullen, 2 De Gex & S. 252.

⁴ In re Morris, 26 L. J. Ch. 688;

⁵ In re Willmot's Trusts, L. R. 7 Eq. 532; Creswick v. Gaskell, 16 Beav. 577. Greenhalgh v. Bates, L. R. 2 P. & D. 47.

simpliciter and absolutely, was considered.¹ In this section we must consider the construction of gifts to individuals or to classes, with a gift to others in case of the death of the first taker, the event of death, which is certain to happen at some time, being coupled with some other circumstance which may never occur at all, as death without having attained majority, or without having married, or without leaving issue or children. Where the vesting of the gift over depends upon death alone, and *not* associated with or qualified by any other event or contingency, the difficulty lies in the fact that the testator has spoken of an event which is certain to happen sooner or later to the legatee in language of contingency, which raises a doubt in the mind of the reader as to what period he meant to refer. In the cases considered in this section where death is associated with other facts, the same difficulty exists with greater force. The question is, Does a gift over upon the death of a legatee associated with the contingent event refer to *his death during the life of the testator*; and, if he survive the testator, does he take absolutely, or does he, if he survive the testator, take a defeasible interest, to cease on his death with the contingency? Where the gift is an immediate one to one or more individuals, with a gift over upon the death of any unmarried, or under age, or without issue, and death under the circumstances mentioned occurs *in the life-time of the testator*, the gift in substitution vests absolutely, as it must, of necessity, at the death of the testator, whether the original gift was immediate or in remainder.² This rule is also applied to a gift to a class with a substitutional gift in case any die, the death being associated with a qualification. Where the class legacy is meant to vest immediately at the testator's death, and the gift over is in the event of any member dying before the legacy is payable, death before the testator is meant of necessity, and those who survive take absolutely.³ So where the devise to the class is to be distributed after a prior life estate, a provision in case of death

¹ § 342.

Lawler v. Holohan (Conn.), 88 Atl. R. 903; *post*, § 347.

² Hence, where the devise is to A. *in fee-simple*, and in case of his death without issue then over, death without issue in the life of the testator is meant, and on A. surviving the testator he takes at once absolutely.

³ Cort v. Winder, 1 Coll. 820. But where a legacy is given to A. *if he survive the probate of the will*, but *if he die before payment*, then to B., and the testator, in express terms,

will vest the devise over in case of death during the life-time of the testator.¹ And, of course, where the gift to a class is made expressly contingent upon the survivorship of its members at the death of the testator, a further limitation, as upon death without issue, means that event occurring *after the death of the testator*.²

§ 346. The meaning of the words "in case of death" with a contingency where the possession is postponed.—The death without issue of a beneficiary, to whom an immediate and absolute interest in fee is given, is in many cases construed to refer to his death *during the life-time of the testator*, for the reason that the court must either so construe it or must construe it as referring to death at any time, *i. e.*, death indefinitely.³ But where the disposition of the property which is devised over "in case of death," with a contingency as "in case of death without issue," is preceded by a prior estate for life or years, which is to begin in possession at the death of the testator, another explanation of the words "in case of death" is possible, and they may relate to another period; that is to say, to the period of the postponement of the possession. In the former case but two alternatives are possible. In the latter case three periods—the life-time of the testator, the life of the prior devisee, and the period thereafter—are open to selection.

If by the words "in case of death without issue" is meant death *before* the termination of the prior estate, the devisee who survives that event will take an absolute interest in fee in possession, which is not defeated by his subsequent death without children or issue. But if by "death without issue" is intended death without issue at any time either before or after the death of the testator, and either in the period during which

gives his executors five years in which to pay legacies, A's legacy does not vest on his surviving the testator, but at the expiration of the period in which legacies are to be paid. In *re Spencer*, 16 R. L. 25, 12 Atl. R. 124. A limitation over in case of the death of a legatee of an immediate vested legacy under twenty-one *simpliciter* means death under twenty-one and

in the life-time of the testator. If the legatee survive the testator he takes absolutely, though he subsequently die under age. *Willing v. Baine*, 12 Eq. Cas. Ab. 545; *Phelps v. Phelps*, 11 Atl. R. 596, 55 Conn. 352.

¹ *Jones v. Frewin*, 12 W. R. 369.

² *Shergold v. Boone*, 13 Ves. 370, 375.

³ *Post*, § 348.

the remainder is postponed or at any time thereafter, the remaindermen, though they take a *vested* interest only on their surviving the life tenant, by the death of any of them in the future without issue that vested interest is defeated.¹ The general rule is that, in the absence of clear evidence of a contrary intention, a devise over in case of death without issue in the case of a remainder, as with an immediate estate or interest, means a death *at any time, and not a death without issue during the life tenancy*. The devisees therefore take a remainder, whether vested or contingent, upon the death of the testator, but which becomes vested in possession and enjoyment only upon the death of the life tenant, and which is then defeasible on their subsequent death without issue.² This rule is often productive of great inconvenience, and has been regarded as particularly subject to contrary implication created by the context.

Thus, if from the phraseology of the will it appears that those who may survive the life tenant are to take an absolute and indefeasible interest, and that in the case of those who do not survive, the issue or children are to take their parents' shares which the parents would have taken had *they* survived, a limitation over on death without issue will conclusively be presumed to mean death *before* the death of the life tenant.³ So, also, if the testator has given a vested remainder to A., which he has expressly directed is to be assigned or transferred to him *after the termination of a life estate in B.*, with a devise over to C. upon A.'s death without issue, it will be held that A.'s death without issue *during the life of B.* was intended, and if A. shall survive B., he will at once take an absolute and in-

¹ Where there is a devise to two daughters, to be divided when they reach majority, but if both die under age then over, and one only attains majority, she takes all. *Clark v. Benton* (N. C., 1899), 32 S. E. R. 556.

² *O'Mahoney v. Burdett*, L. R. 7 H. L. Cases, 386, 12 Moak's Eng. R. 22; *Ingram v. Soutten*, L. R. 7 H. L. C. 408; *Britton v. Thornton*, 112 N. Y. 536; *Williams v. Lewis*, 100 N. C. 142, 5 S. E. R. 436; *Summers v. Smith*, 127 Ill. 645, 21 N. E. R. 191. A direction that

land devised to A. in remainder in fee, after a life estate in the widow of the testator, should be sold if A. should die leaving no children to inherit the land at his death, is not dependent upon the death of A. *during the life of the widow*, but the land may be sold upon A.'s death at any time without children. *Marshall v. Marshall*, 42 S. C. 436 (1894), 20 S. E. R. 298.

³ *Galland v. Leonard*, 1 Sw. 161.

defeasible interest.¹ So where the testator directed that property should, upon the death of A., who had a life estate in it, be conveyed to his children, to be divided among them when they attained the age of twenty-one, but if any should die under age or before acquiring a vested interest then over, the children take a vested and absolute estate as soon as they attain majority, whether before or after A.'s death.² And when the testator provides that if any legatee to whom he gives a vested legacy which is payable immediately shall die *in his life-time or afterwards* without issue, then it shall go over, and that no legatee shall be entitled to a bequest until he shall have attained his majority, a legatee on his attainment of majority takes an absolute interest.³

§ 347. **When death without issue means death in the life-time of the testator.**—If the testator devise property in fee in words conferring an absolute estate, not merely for life only, which it is apparent he intends to vest at his death, and afterwards provides for the disposition of the fee-simple in the property, "*in case of the death of a prior devisee without issue*, or without surviving issue," the words will refer to dying *without leaving issue during the life-time* of the testator. The intention of the testator in providing for a devise over after giving a fee in absolute terms is most likely to prevent a lapse; and if the devisee shall survive the testator, he will take an absolute fee-simple to the property devised to him, which will not be de-

¹ Rickards v. Gray, 6 Houst. (Del., 1881), 232; Lee v. Mumford (Ky., 1898), 44 S. W. R. 91; Stokes v. Weston, 137 N. Y. 433, 37 N. E. R. 515; Field v. Hallowell, 12 B. Mon. (51 Ky., 1851), 517; O'Mahoney v. Burdett, L. R. 7 H. L. Cas. 386, 394, 406, 407; Olivant v. Wright, L. R. 20 Eq. 220, L. R. 1 Ch. D. 346; Barker v. Cocks, 6 Beav. 82. "The time is pointed out when the final and complete distribution is to be made" (i. e., at the death of the life tenant), "and the executory devise must be held to be referred to that time, because it is impossible to call the property back again and hold that the executory devise was then to take effect after there had

been a full and complete distribution of the funds." Sir W. P. Wood, V. C., in O'Mahoney v. Burdett, L. R. 7 H. L. Cases, 386, on page 403. A gift of a residue to the daughter of the testator, her heirs and assigns, after a life estate in the widow of the testator, but, *if the daughter should die without children*, then to the other children of the testator, refers to death during the life of the mother, and the daughter on surviving takes absolutely. McCormick v. McElligott, 127 Pa. St. 230 (1889), 17 Atl. R. 896.

² Wheable v. Withers, 16 Sim. 505; Home v. Pillans, 2 My. & K. 15; In re Johnson's Trusts, 10 L. T. (N. S.) 455.

³ Monteith v. Nicholson, 2 Kea. 719.

feasible on his subsequent death without issue, and the limitation over will be disregarded.¹

§ 348. Exception to the rule that death without issue means death in the life-time of the testator.—The rule is extremely technical in its character. It does not apply where

¹ *Phelps v. Phelps*, 11 Atl. R. 596, 55 Conn. 359; *Coe v. James*, 54 Conn. 511, 9 Atl. R. 392; *Bullock v. Seymour*, 38 Conn. 289, 294; *Lawlor v. Holohan*, 38 Atl. R. 903; *Webb v. Lines*, 57 Conn. 154, 17 Atl. R. 90; *Stone v. McEckron*, 57 Conn. 194; *St. John v. Dann*, 66 id. 401, 84 Atl. R. 110; *Arnold v. Alden*, 50 N. E. R. 704, 187 Ill. 229; *Wright v. Charley*, 129 Ind. 257, 259, 28 N. E. R. 706; *Harris v. Carpenter*, 109 Ind. 540, 544; *Hoover v. Hoover*, 116 Ind. 498, 500; *Antioch College v. Branson* (Ind., 1896), 44 N. E. R. 814; *Moore v. Gary*, 149 Ind. 51, 48 N. E. R. 630; *Ferguson v. Thomason*, 87 Ky. 519, 523, 9 S. W. R. 714; *Trabue v. Trabue* (Ky., 1888), 9 S. W. R. 161; *Carpenter v. Hazelbrigg* (Ky., 1898), 45 S. W. R. 666; *Niles v. Almy*, 161 Mass. 29, 36 N. E. R. 582; *Naylor v. Godman*, 109 Mo. 543, 19 S. W. R. 56; *Burdge v. Walling*, 45 N. J. Eq. 10, 16 Atl. R. 51; *Keepers v. Fidelity T. & D. Co.*, 56 N. J. Law, 302, 28 Atl. R. 585; *Gibson v. Walker*, 20 N. Y. 476; *Downing v. Marshall*, 23 N. Y. 366; *Vanderzee v. Slingerland*, 103 N. Y. 55, 8 N. E. R. 247; *Stokes v. Weston*, 142 N. Y. 433, 37 N. E. R. 515, 24 N. Y. S. 26, 69 Hun, 608; *Benson v. Corbin*, 145 N. Y. 351, 40 N. E. R. 11, 78 Hun, 202; *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. R. 388; *Newcomb v. Lush*, 32 N. Y. Supp. 526, 84 Hun, 254; *Stevenson v. Fox*, 125 Pa. St. 568, 17 Atl. R. 480; *King v. Frick*, 186 Pa. St. 575; *Morrison v. Truby*, 22 Atl. R. 972, 145 Pa. St. 540; *Sugden v. McKenna*, 23 Atl. R. 439, 147 Pa. St. 55; *In re Robinson's Estate*, 149 Pa. St. 418, 24 Atl. R. 297; *Keating v. McAdoo*, 180 Pa. St. 315, 36 Atl. R. 218; *Engel's Estate*, 180 Pa. St. 215, 36 Atl. R. 727; *In re Martin's Estate*, 11 Pa. S. Co. Ct. R. 245; *Harris v. Dyer*, 18 R. L. 540, 28 Atl. R. 971; *In re Swinburne*, 16 R. L. 298, 14 Atl. R. 850; *Shaw v. Erwin*, 41 S. C. 209, 19 S. E. R. 499; *Meacham v. Graham*, 98 Tenn. 190, 201, 39 S. W. R. 12; *First Nat. Bank v. De Pauw*, 86 Fed. R. 722; *In re Lovass' Estate*, 92 Wis. 617, 619, 67 N. W. R. 605; *Ware v. Watson*, 7 D. M. & G. 248; *Johnston v. Antrobus*, 21 Beav. 556; *Clayton v. Lowe*, 5 B. & Ald. 636; *Gee v. Mayor of Manchester*, 17 Q. B. 737; *Woodburne v. Woodburne*, 23 L. J. Ch. 336. The phrase "in the event of death leaving issue, the issue to have the parents' share," includes the issue of a legatee who dies in the life-time of the testator. *Outcalt v. Outcalt*, 42 N. J. Eq. 500, 8 Atl. R. 532. The presumption that the testator means death without issue during his life-time, by which the legatee takes an absolute estate if he survives him, and not merely an estate for life with remainder on his death without issue, is materially strengthened where the testator has created life estates by appropriate language in other parts of his will. *Coe v. James*, 54 Conn. 511, 9 Atl. R. 392. A devise to A. to him and his heirs forever if he should have living issue, but if he should not, then to him for life only, vests a fee in him at the death of the testator if he had living issue prior to that date; and this is not divested by the fact that he dies leaving no issue, though there is a limitation over upon his death without leaving issue. *Clough v. Clough*, 64 N. H. 509, 15 Atl. R. 127; *Chaplin v. Doty*, 15 Atl. R. 362, 60 Vt. 712.

there are indications, however slight, that the testator indicated a death without issue occurring subsequent to his death. The rule which construes death without issue to mean death without issue prior to that of the testator is not favored by the courts. The ages and condition of the primary devisees may be material in determining whether the testator meant death without issue before or subsequent to his death. If at the date of the execution of the will the primary devisees were unmarried, and there is a devise over to strangers in case of their death without issue, the presumption that death prior to that of the testator is meant is rebutted. This rule is applicable to a devise to the children of the testator share and share alike, with a devise over to the heirs of the testator or to a third person, not a lineal descendant, upon the death of any child without issue. In such a case, particularly where at the date of the execution of the will any of the primary devisees are unmarried, it may be fairly presumed that the testator had in contemplation a future marriage and birth of issue, and that, intending to keep the property in his family, he meant a death without issue to take place after his death. If, therefore, the primary devisees survive him, they take an estate in fee which is defeasible by their subsequent death without issue.¹ If the devise to the primary devisee, upon whose death without issue the devise over is to take effect, is for life in express terms, or if upon the whole will it is apparent that the testator did not intend that he should in any event take the absolute interest, death without issue will not be confined to a death during the lifetime of the testator, but a death at any time without issue will suffice to bring the devise over into effect.²

¹ *Hutchins v. Pearce*, 80 Md. 434, 31 Atl. R. 501; *Summers v. Smith*, 127 Ill. 645, 21 N. E. R. 191.

² *Hollister v. Butterworth* (Conn., 1898), 40 Atl. R. 1044. *Cf. ante*, § 347. So if the testator has conferred upon the primary devisee a power of appointment in case of his or her death without issue, it will be presumed that he intends a death without issue *after his death*, and the devisee will take a fee-simple defeasible upon his death without issue and in default of

an appointment under the power. *Mead v. Maben*, 131 N. Y. 255, 30 N. E. R. 98; reversing 14 N. Y. Supp. 732, 60 Hun, 268. The presumption that the testator intended a death after his death is strengthened here by the circumstance that he divides his estate among several primary devisees, with the provision that the share of any one dying without issue shall go to the survivors of the class. And this presumption becomes conclusive where the survivorship is applicable

§ 349. The period of survivorship — Words of survivorship referred to the death of the testator when possession is postponed.— Where the legacy is to several, and the survivors of them to be paid at the death of the testator,¹ and, *a fortiori*, when the testator expressly states that *on the death of any of several legatees* his share is to go to the *survivors*,² survivorship at the death of the testator is meant. The determination of the period of survivorship, where the gift to survivors is *not*, as in the above cases, immediate, *i. e.*, where there is a prior estate beginning *at* the death of the testator, with a remainder to A. and B. and the *survivor* of them, or to a class and the surviving members of it, the period of survivorship receiving no express mention, depends not upon any particular form of words, but wholly upon the intention of the testator, to be gathered from the whole will. The decisions both in England and America are wholly irreconcilable, and hence of but little assistance. The law favors an early vesting,³ and for this reason many cases, where no indication of a contrary intention appeared, have referred the survivorship to as early a period as possible, *i. e.*, to the death of the testator. Those who are *then living* take vested remainders, which, though their possession is postponed, are devisable and transmissible to heirs or next of kin. If the remainderman does *not* survive the life tenant, his representative or heir takes the interest he would have taken had he survived. This has been so held where the gift was to individuals and the *survivor of them*,⁴ or to a class and the surviving members of it, as to the “surviving children” or “*brothers and sisters*” of the testator or of some other per-

to the accruing shares as well as to the original shares of those dying without issue. *Galloway v. Carter*, 100 N. C. 111, 5 S. E. R. 4.

¹ *Smith v. Horlock*, 7 Taunt. 129; *Danily v. Johnson*, 8 Rep. 808, 68 L. T. 20; *Dutton v. Pugh*, 45 N. J. Eq. 426, 46 N. J. Eq. 554, 21 Atl. R. 950, 18 Atl. R. 207.

² *Russell v. Long*, 4 Ves. 551, 553; *Bindon v. Suffolk*, 1 P. W. 96.

³ § 344.

⁴ *Mowatt v. Carow*, 7 Paige (N. Y.), 339; *Lawrence v. McArter*, 10 Ohio

(1840), 37; *Moore v. Lyons*, 25 Wend. (N. Y., 1840), 119; *Roebuck v. Dean*, 2 Ves. Jr. 265; *Perry v. Woods*, 3 Ves. 204; *Brown v. Bigg*, 4 Ves. 551; *Vason v. Estes*, 77 Ga. 352. A devise to the children of A. and the survivors of them, after a life estate, gives the children of A. living at the death of the testator a vested remainder as joint tenants, which is alienable, subject to a condition subsequent. *Stimpson v. Batterson*, 5 Cush. (Mass.) 153, 156; *Ducker v. Wear*, 146 Ill. 9, 34 N. E. R. 558.

son,¹ with or without a provision accompanying it that the issue of any one who is deceased shall take the parent's share, with a limitation to the survivor of the shares of those *who die without issue*.

§ 350. Cases in which words of survivorship have been referred to the period of precedent interest where the possession is postponed.—In England the rule which refers survivorship to the death of the testator, and vests the property in those who are *then* alive, though possession is postponed, has been repudiated so far as it was attempted to apply it to gifts by way of remainder or executory devise to classes and the surviving members,² in spite of the very many early decisions in its favor. The first step by way of breaking down the rule was made where the future gift was not of land, but of money which was to be the proceeds of land expressly directed to be sold upon the death of a life tenant who had the gift of its income, the proceeds to be *then* distributed. Here the property which is to be distributed is not in a condition to be divided as directed by the testator until the death of the life tenant, and hence only those who survive him can take.³ Where the gift is to a person for life, and after *his* death to *his* surviving children, only those of his children who survive *him* take.⁴

But the rule which postpones the period of survivorship

¹ Winters' Estate, 114 Cal. 186; 175; Ballard v. Conners, 10 Rich. Eq. Couch v. Gorman, 1 Conn. (1814), 36; (S. C.) 389, 392; Schoppert v. Gillam, Lunt v. Lunt, 108 Ill. (1884), 307; 6 Rich. Eq. (S. C., 1858), 83; Frierson Grimme v. Freidrich, 104 Ill. 245, 45 v. Van Buren, 7 Yerg. (17 Tenn.) 606, N. E. R. 498; Harris v. Carpenter, 109 613; Satterfield v. Noyes, 11 Humph. Ind. 540, 544; Hoover v. Hoover, 116 (Tenn., 1851), 58, 60; Stone v. Lewis, Ind. 498, 500; Heilman v. Heilman, 84 Va. 474, 5 S. E. R. 282.
² Cripps v. Wolcott, 4 Mad. 11, 15.
³ Hoghton v. Whitgreave, 1 Jac. & W. 146; Brograve v. Winder, 2 Ves. Jr. 634; Newton v. Ayscough, 19 Ves. 534.
⁴ Neathway v. Reed, 8 D. M. & G. 18; Daniell v. Daniell, 6 Ves. 297; Spear v. Fogg, 87 Me. 132, 139; Den v. Sayre, 2 N. J. Law, 598; Tucker v. Stites, 10 Geo. (Miss.) 196. See *post*, § 553.

129 Ind. 59, 64; Wright v. Charley, 129 Ind. 257, 259; Duclos v. Benner, 62 Hun, 428, 17 N. Y. S. 169; In re Herrick, 13 N. Y. (1854), 105; Clark v. Clark, 3 Bradf. (N. Y.) 82; Patchen v. Patchen, 1 N. Y. S. 913; Sinton v. Boyd, 9 Ohio (1896), 30; Smith v. Black, 29 Ohio St. 488, 498; Ross v. Drake, 37 Pa. St. (1860), 373; Bickley v. Read, 15 Pa. St. (1850), 83; Hubbert's Estate, 6 Pa. Dis. Ct. R. 96; In re Patrick's Estate (1894), 162 Pa. St.

until the termination of the prior estate may also be applicable where the remainder is given to the surviving children,¹ or to the children "then living" of the testator,² or to his brothers and sisters living at the death of his widow, who is the life tenant.³ All members of the class who are alive at the death of the testator take a contingent remainder; and, as the contingency is that only those who are alive at the death of the life tenant shall take in possession, the remainder is neither transmissible nor devisable.⁴ And a remainder to those of a class who may be alive when a life tenant dies without leaving children, the children of deceased members of the class to take the parent's share by substitution, vests at once in the substitutional legatees on the death of the life tenant whose parent has died during the life-time of the prior taker, as against the estate of their father.⁵

¹ Wren v. Hynes, 2 Meta. (Ky.) 129; Branson v. Hill, 81 Md. 181; Hulburt v. Emerson, 16 Mass. (1820), 244; Olney v. Hull, 21 Pick. (88 Mass.) 811.

² Patchen v. Patchen, 121 N. Y. 432, 24 N. E. R. 695; Shanks v. Mills, 25 S. C. 362. And see cases cited *ante*, p. 470, note 4.

³ Coveny v. McLoughlin, 148 Mass. 576, 20 N. E. R. 185; Hills v. Barnard, 153 Mass. 67, 25 N. E. R. 56; Denny v. Kettell, 185 Mass. 138; Naylor v. Godman, 109 Mo. 543 (1891), 19 S. W. R. 56; Foster v. Foster, 50 Mich. 450; Eberts v. Eberts, 42 Mich. (1879), 404; Union Association v. Montgomery, 70 Mich. 567, 595; Jones' Will, 46 N. J. Eq. 554, 45 N. J. Eq. 426; Slack v. Bird, 20 N. J. Eq. 238; Williamson v. Chamberlain, 29 N. J. Eq. 373; In re Patrick's Estate (1894), 162 Pa. St. 175; Woelper's Estate, 126 Pa. St. 562, 24 W. N. C. 233, 17 Atl. R. 870; Mullarkey v. Sullivan, 136 N. Y. 227, 32 N. E. R. 762; Simpson v. Cherry, 84 S. C. 68, 12 S. E. R. 886; Reams v. Spann, 26 S. C. 561, 563, 2 S. E. R. 412. And compare *post*, §§ 557, 558.

⁴ Roundtree v. Roundtree, 26 S. C. (1887), 450, 2 S. E. R. 474; Armstrong v. Armstrong, 54 Minn. 248, 55 N. W. 2. 971. A remainder to A., B. and

C., "as many of them as *may be living* at the death of D., and if any be dead, leaving issue, his share to such issue," is a contingent remainder with a double aspect. It vests in title and possession, at D.'s death, in all the surviving remaindermen of the class and in the issue of such as are then dead as purchasers by substitution. Whitesides v. Cooper, 20 S. E. R. 295, 115 N. C. 570. If a remainder is devised to individuals, or to a class, with a limitation to the survivors of the shares of those who die *without issue*, and a direction that if a remainderman dies *leaving issue, such issue is to take the parent's share*, the issue surviving a deceased remainderman take, not only the *original* share the parent would have taken had he survived, but also take, by accrual, an equal portion with the surviving members of the original class in all shares which have lapsed by the death of the other members of the original class without issue. Smith v. Secor, 157 N. Y. 402, 52 N. E. R. 179; Mullarkey v. Sullivan, 63 Hun, 156, 17 N. Y. S. 715; Graves v. Spurr (Ky., 1898), 31 S. W. R. 483; *post*, § 352.

⁵ Reiff's Appeal, 124 Pa. St. 145, 16

Where the devise to the survivors is made contingent, in express language, it will be conclusively presumed that the period of survivorship is the death of the life tenant. This is the case where the gift is to A. for his life, and *on his death without issue to B., C. and D.*, and the survivors of them, or to the surviving members of a class.¹ The devise to B., C. and D. is an executory devise, which is contingent until the death of A. without issue, when it becomes indefeasible in those who are *then* living.

The period of survivorship may, by special words, be referred to survivorship *during the life-time of a prior tenant*. Thus, where the gift is to A. for his life, and *after his death* to B. and C., and, if either of them die in the life of A., then to *the survivor*, the words refer to survivorship between B. and C., and not between them and A. If, therefore, either of the remaindermen die during the life-time of A., the remainder vests absolutely in the other, and is not liable to be divested by *his* death during the life of the tenant for life.² In a case where the testator has created a double contingency on which distribution is to be made, as to children when the youngest attains his majority, with survivorship among them, and, if *any die under twenty-one*, his share to the survivors, *i. e.*, those attaining majority to take, the court will construe the shares as vesting in those who attain majority, though they shall not survive until the youngest child shall attain *his* majority.³

§ 351. The primary meaning of the word "survivors"—When it is co-extensive in signification with "others."—A question of construction frequently arises where the testator devises property, whether real or personal, to several devisees or to a class, but *if any of them should die without leaving issue*,

Atl. R. 686, 24 W. N. C. 816. A devise to A. and B., to be divided equally on the death or marriage of C., but if either A. or B. shall die before C., then to the survivor, vests in them absolutely upon C.'s marriage, and is not divested by the subsequent death of either before C. Savings Bank v. Hayes, 18 R. I. 464, 28 Atl. R. 906.

¹ Naylor v. Godman, 109 Mo. 543, 19 S. W. R. 56; Woelper's Estate, 17 Atl. R. 870, 24 W. N. C. 238 (1889), 126

Pa. St. 562; Jenour v. Jenour, 10 Ves. 562; Roe d. Sheers v. Jeffery, 7 T. R. 589.

² White v. Baker, 2 D. F. & J. 53, reversing 29 L. J. Ch. 577, 6 Jur. (N. S.) 209.

³ Crozier v. Fisher, 4 Russ. 398; Dawson v. Schaeffer, 52 N. J. Eq. 341, 30 Atl. R. 341. Cf. *contra*, Wilson v. Bryan, 90 Ky. 482, 14 S. W. R. 533. See also *post*, § 554.

or during minority, or on another contingency, his share to go to the survivor or survivors, and one or more of the primary devisees dies *without* leaving issue or under age, while others die leaving issue or attain majority. The question arises in disposing of the shares of those who die *without issue*, whether the children of deceased legatees shall participate, or whether it is to go only to the actual survivors of the original class. The plain and strict signification of the word "*survivor*" is one who outlives others, and in the above devise the word should receive its strict meaning, *excluding the children*,¹ and also the next of kin of those who have died before distribution.² This natural meaning will be given to the words, and those only will take as survivors who are living at the death of the others without issue, in the absence of anything in the will clearly showing that the testator has employed the word with any other intention.³

This rule of construction is applied to a limitation to survivors, though the testator has in fact expressly provided that the children of a deceased legatee shall take, by representation, the share which *their* parent had enjoyed. Though they may take *this*, they cannot take the share of one who has died without issue, for *that* goes to those only who survive the legatee

¹ The testator directed a fund to be divided among a class after the death of A., and that, if any member of the class should die before division, *his* portion to go to the survivors. Those who survive the life tenant take all, to the exclusion of the issue of those who had died. In *re Bartholemew's Estate*, 26 Atl. R. 550 (1893), 155 Pa. St. 314. Where a testator gave a fund equally to five children, *nominatim*, the issue of a deceased child to take his father's share, the share of any child dying without issue to the survivors, it was held that the representatives of a deceased child who died leaving issue should participate in the share of those who died without issue. *Cummings v. Stearns*, 161 Mass. 66 (1894), 37 N. E. R. 758.

² In *re Denton*, 33 N. E. R. 492,

137 N. Y. 428, excluding the widow of one who died *without issue*.

³ *Davis v. Davis*, 118 N. Y. 411 (1889), 23 N. E. R. 568; In *re Denton*, 137 N. Y. 428 (1893), 33 N. E. R. 482, 12 N. Y. S. 52; *Anderson v. Brown*, 84 Md. 261; 35 Atl. R. 937; *Naylor v. Godman*, 109 Mo. 543, 19 S. W. R. 56; *Ferguson v. Dunbar*, 3 Bro. C. C. 468; *Milsom v. Awdrey*, 5 Ves. 465; *Davidson v. Dallas*, 14 Ves. 576; *Dowling v. Reber*, 65 Miss. 259 (1887), 3 S. Rep. 654; *Reiff's Appeal*, 124 Pa. St. 145, 16 Atl. R. 636, 24 W. N. C. 31. A devise to A. and B., children of the testator, and if either of them should die without children, his share to *my other children*, includes A. and B. among the other children. *Brooks v. Kip* (N. J., 1897), 35 Atl. R. 658.

so dying.¹ The effort has been repeatedly made in cases of limitations to survivors to construe the word as synonymous with "others," so that *all* the legatees would participate who were members of the class at any time. In an English case it is said that this would be the correct construction where death is coupled with any other contingency, as under majority or without issue.² But this distinction is of no value and the case has been overruled. But if the testator, after devising property to several, and providing that *on the death of any one of the devisees without issue* his or her share is to go to the *survivors*, with a contingent gift of the property over in case *all the devisees should die without leaving issue*, the word "survivors" will be construed *others*, and the children of deceased members of the class will participate with the survivors *per stirpes*.³ The word "survivors" will be given the meaning of "others" where the devise is to A., B. and C. for life, and, on the death of *each*, remainder to his or her children respectively, but if any die without children, then to the survivors and their children. The intention of the testator to keep the property in the family of each of the life tenants, by his giving a remainder to children as purchasers, is sufficient to show that the share of any one dying without such children shall go to children of any who has died before the period when any life tenant dies without issue.⁴

§ 352. **The disposition of accruing shares.**—In an early case it was held that where the testator gives a fund to several as tenants in common, whether as a class or as individuals, with a limitation to survivors upon the death of *any* of them unmar-

¹ Lee v. Stone, 1 Ex. 674; Leeming v. Sherratt, 2 Hare, 14. Where a will devised property to the sisters of the testatrix, or the *survivors of them*, and she left one sister and the children of another deceased, the surviving sister took to the exclusion of the children. Prendergast v. Walsh (N. J. Eq., 1899), 42 Atl. R. 1049.

² Aiton v. Brooks, 7 Sim. 204.

³ Cooper v. Cooper, 31 Atl. R. 1043, 7 Houst. (Del., 1887), 488. See also Gordon v. Gordon, 32 S. C. (1889), 563, 11 S. E. R. 334, and Hood v. Board-

man, 148 Mass. (1889), 330, 19 N. E. R. 379, which illustrate this construction, though this precise point was not considered. Cf. Silvers v. Canary, 114 Ind. 129, 16 N. E. R. 166; Cole v. Sewell, 4 D. & W. 1, 2 H. L. Cas. 186; Doe d. Watts v. Wainwright, 5 T. R. 427; Waite v. Littlewood, L. R. 8 Ch. 70; Badger v. Gregory, L. R. 8 Eq. 78.

⁴ Waite v. Littlewood, L. R. 8 Ch. 70; Palmer's Settlement, L. R. 19 Eq. 320; Wake v. Varah, 2 Ch. D. 348; Harman v. Dickinson, 1 Bro. C. C. 91.

ried or during minority, and one dies, his share goes to those who survive him, and if *afterwards* another dies, only the latter's *original* share goes to those who survive *him*, but not the interest which accrued to him; for that, says the court, is a new legacy, and, having vested, devolves upon his personal representatives.¹ This rule is applicable when the will is silent. And the fact that the testator directs that *the share of any legatee dying* shall go to the survivors will not carry his accruing share. The word "share" will conclusively be presumed to refer *only* to his original share, and not to any interest which may have been gained by him by reason of survivorship.² The same rule applies where the testator employs the term "*portion*." Thus, where a fund was to be divided among the children of A., to be paid to *each one on majority* or marriage, and in case any one should die before his or her "*portion*" *should become payable*, then to the survivors, the share which accrues *before the date of payment* does not pass with the original shares to the surviving child or children.³ Where the income is given to several *nominatim*, with the principal to his issue, and, on the death of any without issue, his share to the others, and one dies without issue, and then one dies leaving a child, the principal should be paid at once to the latter, but only the income to the others of the original class.⁴

When, from the language of the will, it appears that the testator meant that the whole fund *as an aggregate* should, at the time of distribution or division, be paid over to the then survivors of the primary legatees, the survivors will take accruing shares as well as the original shares which have fallen in.⁵

In the absence of a *very clear* expression of intention, it is settled that limitations or qualifications which are attached to the original shares do not attach to accruing shares. Thus,

¹ *Pain v. Benson*, 3 Atk. 78, 80; *Ex parte West*, 1 Bro. C. C. 575; *Fiske v. Eddy*, 147 Mass. 151 (1888), 16 N. E. R. 768; *In re Adams*, 2 Pa. Dis. Ct. R. 590; *McGee v. Hall*, 26 S. C. (1884), 179, 1 S. E. R. 179, 771; *Hill v. Hill*, 1 Strobb. Eq. (S. C., 1846), 22; *Henley v. Robb*, 2 Pickle (86 Tenn.), 574, 7 S. W. R. 190.

² *Woodward v. Glassbrook*, 2 Vern. 888; *Rickett v. Guillemard*, 12 Sim.

88; *Jones v. Hall*, 16 Sim. 500. See *ante*, § 320, as to meaning of the word "share."

³ *Bright v. Rowe*, 3 My. & K. 316.

⁴ *Balch v. Pickering*, 154 Mass. 363, 28 N. E. R. 293.

⁵ *Worlidge v. Churchill*, 3 Bro. C. C. 465; *Eyre v. Marsden*, 2 Keen, 564; *Sillick v. Booth*, 1 Y. & C. C. 121, 739; *Leeming v. Sherratt*, 2 Hare, 14.

though the original shares are given for life only, a gift of the shares accruing by survivorship, in indeterminate language, may carry them absolutely.¹ So, where an original share is limited over to survivors on the death of the primary legatee *without issue*, and the accruing shares *are given generally*, the accruing shares do not go over on death without issue, but the survivor takes absolutely an indefeasible interest, and on *his* death without issue the interest which accrued to him by survivorship goes to his personal representatives.² Nor can a tenancy in common be implied in the accruing shares from the fact that the original shares were to be so held.³ From the fact that the original and the accruing shares *may* vest at different dates, it may happen that the classes in which they vest will differ numerically. This happens where the legacy is to several for life without survivorship, remainder to their children respectively. The original share of each life tenant will vest in his children who are living *at his death*. But an accruing share coming to the children of a life tenant who has died leaving children, upon the subsequent death of another life tenant *without children* will vest in the children of the former-legatee who are living at the death of the second legatee.⁴

§ 353. **Substitutional gifts — Interchangeability of the words "and" and "or."**—The testator may intend to provide for the death of a legatee and to prevent a lapse, though he does not make express use of the phrase "in the event of the death" of the legatee. He may have intended that a gift shall be substitutional, though he says nothing of the death of the person on whose death the substitution is to take place.

The simplest form of a substitutional gift is a limitation "to A., *or* his heirs, *or* issue, *or* children," *simpliciter*, nothing being said of death or survivorship.⁵ It may be implied from this terminology that the death of the person designated was in the mind of the testator, and that he intended to prevent a lapse and to give the substituted class of legatees an independent gift as purchasers under his will. Where the gift is immediate, the cases treat words which are usually words of limita-

¹ *Ranelagh v. Ranelagh*, 4 Beav. 419; *Vandergucht v. Blake*, 2 Ves. Jr. 534.

² *Gibbons v. Gibbons*, 6 Sim. 260.

³ *Jones v. Hall*, 16 Sim. 500.

⁴ *In re Ridge's Trust*, L. R. 7 Ch. 665.

⁵ *Ante*, § 332.

tion, as "heirs" and the like, introduced by the word *or* coming after a devise to persons *nominatim* or to a class, as words of substitution intended to guard against a lapse. Hence, if an immediate bequest or devise is "to A. *or* his issue," or "to A. *or* his children,"¹ or "to the members of a class, or their children, heirs,² or issue," the original gift will vest absolutely in those only of the original beneficiaries or members of the class who survive the testator, and the substitutionary beneficiaries named will then take absolutely as purchasers the shares which the parents or ancestors would have taken had they survived. Death during the testator's life-time will be conclusively presumed to be referred to, the words will be given their literal meaning, and "*or*" will not be changed into "*and*." This is true *a fortiori* where the words introduced by *or* are ordinarily words of purchase.³ If, however, the words which follow the disjunctive "*or*" are words of limitation, the court may not construe them as creating a substitutional gift; as where the devise is an immediate one to A. *or* the heirs of his body. A., if he survive the death of the testator, will take a fee tail, and if he die before the testator the devise lapses.⁴

A different question must be considered where a devise is to A. *or* his heirs, and vesting is postponed until *after* the death of the testator. The alternative limitation may here be referred to either of two periods; *i. e.*, the life-time of the testator, or to the period which intervenes between that event and the coming into possession. The present rule is that where a remainder is given to A. *or* his heirs, or to a class *or* their heirs, and possession only is postponed, the remaindermen who survive the testator take vested interests, which are not defeated by their death during the life tenancy. The heirs of the primary beneficiaries who predecease the life tenant take by de-

¹ Montagu v. Nucella, 1 Russ. 165. 15 Ohio St. 103; Kimball v. Story, 108

² Gittings v. McDermott, 2 My. & Mass. 382, 385; Heyward v. Heyward, 7 Rich. Eq. (S. C.) 289; Margitson v. K. 69. Hall, 10 Jur. (N. S.) 89; Whitcher v.

³ *Ante*, § 332; Taylor v. Connor, 7 Ind. 115; Robb v. Bell, 12 B. Mon. (Ky.) 643; Sawyer v. Baldwin, 20 Pick. (Mass.) 384; Sayward v. Sayward, 7 Me. 175, 181, 210; Hand v. Marcy, 28 N. J. Eq. 59, 62; Phyfe v. Phyfe, 8

Bradf. (N. Y.) 45; Brasher v. Marsh, 9 Eq. 258.

⁴ See cases cited under § 332, *ante*.

scent from their ancestors, and not as purchasers.¹ And the effect of this construction is to substitute the word *and* for *or*.²

The same rule of construction, by the operation of which *or* is changed into *and*, where the remainder vests *in interest at the death of the testator*, also applies where the remainder is contingent as regards the members of the *original* class only. Thus, where the future gift is to a class, as "to children who may be living at the death of the tenant for life *or* to their issue," those of the class who survive to the period of distribution take as original beneficiaries, *i. e.*, as purchasers, and the issue, heirs or children, as the case may be, of deceased members take the parent's shares by substitution as purchasers also.³ But the living issue of the surviving members of the class take nothing. A remainder to a class, the children of each member thereof to take the parent's share in case *he* does not survive, gives the members of the original class a vested remainder, which is divested on the death of a member without children. The children take by substitution and not by descent.⁴

¹ *Miller v. Gilbert*, 22 N. Y. S. 355, 3 Misc. R. 43, 144 N. Y. 68 (1894), 88 N. E. R. 979; *Bolton's Trustees v. Ohio Bank*, 50 Ohio St. (1893), 290, 83 N. E. R. 1115; *Crews' Adm'r v. Hatcher*, 91 Va. 378, 21 S. E. R. 811; *Sloan v. Hanse*, 2 Rawle (Pa., 1829), 28. *Contra*, *Gish v. Moomaw*, 89 Va. 345, 15 S. E. R. 868; *Cody v. Bunn*, 46 N. J. Eq. 131, 18 Atl. R. 857. *Contra*, *Gardlestone v. Doe*, 2 Sim. 225.

² So a devise to daughters *or* daughters' children living at the death of a life tenant will go to all surviving daughters and to the children of those deceased. *Richardson v. Spang*, 1 P. W. 433, 434. In the same manner a remainder to A. *or* her children, and to B. *or* her children, will give A. and B. vested remainders in fee at the death of the testator. *Eccard v. Brooks*, 2 Cox, 218. The words *or heirs and assigns*, in an immediate or in a future gift to legatees *nom-inatim*, or to a class *or* their heirs and assigns, are not words of substitution, but of limitation, and "*and*"

will therefore be substituted for "*or*." *In re Walton's Trusts*, 8 D., M. & G. 173; *In re Hopkins' Trusts*, 2 H. & M. 411; and see other cases cited *ante*, § 332.

³ *King v. Cleveland*, 26 Beav. 26, 4 De Gex & J. 477; *In re Philips*, L. R. 7 Eq. 151; *Burton v. Hellyar*, L. R. 14 Eq. 160; *Wingfield v. Wingfield*, L. R. 6 Ch. 796; *Dunlap v. Fant*, 74 Miss. 197 (1896), 20 S. R. 874; *Tiencken v. Tiencken*, 131 N. Y. 391 (1892); *Smith v. Secor*, 157 N. Y. 402 (1897), 53 N. E. R. 179; *Mullarkey v. Sullivan*, 63 Hun, 156, 17 N. Y. S. 715; *Lepps v. Lee*, 92 Ky. 146, 17 S. W. R. 146.

⁴ *Corey v. Springer*, 138 Ind. 506, 37 N. E. R. 322. An immediate gift to children who may be living *at my decease*, and to the descendants of said children as shall be deceased, vests in children who survive the testator, subject to be divested by his death, then to his descendants, but if none, to his next of kin or legatee. *Bowditch v. Ayrault*, 33 N. E. R. 1067, 138 N. Y. 222.

The interests of the members of the original class are contingent upon their survivorship until the date of distribution, though the substitutional gifts *vest at once upon the death* of the parent or ancestor.¹ But sometimes the contingency of survivorship applies both to the shares of the original class and to the shares of those who are substituted for them, as where it is to a "*class or their children who may be living*" at the date of distribution, and then the court will not alter "*or*" into "*and*."² Where the gift is a future gift to a class, with a substitutional gift to the children of those members of the class who do *not* survive until the period of distribution, and the distribution is to take place *after the expiration of the life estate*, the children or issue of those who die *before* the testator take with the children or issue of those who survive him, but who die during the life estate,³ unless it appears from the will, expressly or by necessary implication, that the testator referred to the class as existing at his death. And a gift which is given in substitution to a class in place of a devise to A. or B. *nominatim*, with its enjoyment postponed until the expiration of a life estate, will take effect in favor of the substituted class as constituted when the date of distribution arrives, though the original beneficiary may have died in the life-time of the testator.⁴

§ 354. Substitutionary gifts where members of a class are dead at the date of the will.—A gift to A. *nominatim*, with a gift to A.'s children or issue "in the case of his death," will not lapse because A. is dead at the execution of the will, but the children will take as purchasers. It is presumed that death in the life-time of the testator was intended.⁵ The fact that the testator speaks of A. *as alive* will not defeat the intention to benefit his children in case he is dead. The question of the effect of the death of a member of a class *before* the execution

¹ Crane v. Bolles, 49 N. J. Eq. 373, 24 Atl. R. 237.

² Congreve v. Palmer, 16 Beav. 335; Whitesides v. Cooper, 115 N. C. 570, 20 S. E. R. 295; Stone v. Lewis, 84 Va. 474, 5 S. E. R. 282; Reams v. Spann, 26 S. C. 561, 2 S. E. R. 412.

³ Smith v. Smith, 8 Sim. 353; Jones

v. Frewin, 12 W. R. 369; Habbergham v. Ridehalgh, L. R. 9 Eq. 395.

⁴ Girdlestone v. Doe, 2 Sim. 225; Porter's Trusts, 4 K. & J. 188; Hobgen v. Neale, L. R. 11 Eq. 48.

⁵ Hannam v. Simons, 2 De Gex & J. 151; Ive v. King, 16 Beav. 46; Hobgen v. Neale, L. R. 11 Eq. 48; ante, § 353.

of the will is more difficult. Under modern statutes modifying the common-law rule of lapse it is frequently provided, either expressly or by implication, that, where a member of a class who is related to the testator shall predecease him, his or her share shall not lapse, but shall go to his or her heirs or next of kin.¹ Hence, where there is a gift to a class, as to children, sisters or nephews of the testator, with substitution in case of the death of any of them, meaning death in the lifetime of the testator, the substitutionary beneficiaries take, though the original legatee was dead *at the date of the will*.²

The determination of the question whether a clause of substitution shall, aside from the statute, or where that does not apply, operate where one or more members are dead at the date of the execution of the will, and it is provided that the children of any deceased member shall take the parent's share, depends upon whether or not the gift to the members of the *original class is conditional upon their being alive at the date of the will*. Where the primary devise is to a class who may "*now be living*" and to the children of those who may be dead, the children of those deceased take. The gift to the children, though *in form* substitutional for parents, is *in fact* original and substantive. The two classes form one composite class, for nothing is given to any parent as of the original class who is dead, and the issue of such parents as are *then* deceased take as original beneficiaries and not by substitution.³ Thus, where the gift is to the

¹Chenault v. Chenault, 88 Ky. 83 (1888), 11 S. W. R. 424; Howland v. Slade, 155 Mass. 415, 416; *ante*, § 338.

²Hayward v. Baker, 21 N. E. R. 142 (1889), 113 N. Y. 366; Geery v. Skelding, 62 Conn. 499 (1892), 27 Atl. R. 77; Lawrence v. Hebbard, 1 Bradf. (N. Y.) 252; Loring v. Thomas, 1 Drew. & S. 497; Jamison v. Hay, 46 Mo. (1870), 546, 563; Guitar v. Gordon, 17 Mo. (1853), 408, 414. See other cases *ante*, § 338. A gift to the children of the members of a class by substitution in the event of any members dying, not generally, but "during the *lifetime of the testator*," will go to children of a member dead at the execution of the will. In re Musther, L. R. 43 Ch. D. 569. *Contra*, In re Mor-

rison, 139 Pa. St. 306, 20 Atl. R. 1057, 27 W. N. C. 163; Christopherson v. Naylor, 1 Mer. 320.

³Attwood v. Alford, L. R. 2 Eq. 479; Smith v. Smith, L. R. 5 Ch. 342. A gift to a composite class consisting of two or more generations may be made so that all may take as original members of the class *per stirpes*. A direction that issue of deceased children may take by way of substitution the share their parents would have taken will not prevent the children of a child dead at the date of the will from taking. In re Parsons, 8 Reports, 430; Martin v. Holgate, L. R. 1 H. L. Cases, 175; Bebb v. Beckwith, 2 Beav. 308.

members of a class who shall be alive at a particular time, as to the "children of A. living at his death and to the issue of those *then* deceased," the issue of a child who is dead at the date of the will take as original devisees, though they are expressly directed to take a "parent's" share.¹ The gift is to two independent and original classes, each of which takes *inter se* substantive and independent benefits, though in form the language of gift is substitutional, and one class *appears* to be subordinate to the other.² On the other hand, if the gift to the children or issue of the members of the original class who are deceased is substitutional *in fact* as well as in form, so that children are only to take what their parent would have taken in case he had survived to the period of distribution, the issue of those who are dead at the date of the will take nothing. For if only those of the original class who are *in esse* at the date of the execution will take if *they survive*, only those of the substituted class can take who stand in the place of such members as might survive, and who can point out some one of the members of the original class as the source of what they are entitled to.³ If from the will it is apparent that the testator has in mind only the *future death* of a beneficiary, the issue or children of those who are dead at the execution are not to be let in. Thus, where the gift is simply in the alternative, as to a "class or to their issue living at *their* decease,"⁴ or to a class *and* their issue or children,⁵ or to the "children of A. *then* living and the issue of any of *said* children,"⁶ or to nephews and nieces "and in case of the death of any of my *said* nephews," or to my brothers and sisters *or* their heirs,⁷ or to the brothers of A. *or* the children of the *same*, *if they be dead when this will* goes into effect,⁸ the children or issue of members of the class who died before the date of the will take nothing. Where the provision

¹ Tytherleigh v. Harbin, 6 Sim. 329.

² In re Sibley's Trusts, L. R. 5 Ch. D. 494; Rust v. Baker, 8 Sim. 448; Coulthurst v. Carter, 15 Beav. 421; Clay v. Pennington, 7 Sim. 370; Faulding's Trusts, 26 Beav. 268; Heasman v. Pearse, L. R. 7 Ch. 265.

³ Christopherson v. Naylor, 1 Mer. 320; Peel v. Catlow, 9 Sim. 373; In re Riddell, W. N. 1880, p. 94; Gray v.

Garman, 2 Hare, 268; Thompson's Trusts, 2 W. R. 218.

⁴ Congreve v. Palmer, 16 Beav. 435.

⁵ Parker v. Tootal, L. R. 11 H. L. C. 143.

⁶ In re Thompson, 2 W. R. 218, 5 D. M. & G. 280.

⁷ Wingfield v. Wingfield, L. R. 9 Ch. Div. 658, 666.

⁸ In re Riddell, W. N. 1880, p. 94.

is for children of the testator, the courts are inclined to construe the clause of substitution to include those dead at the execution of the will in order to distribute the testator's bounty equally among the several branches of his family. Thus, where the provision was for "*all and every*" the children of A., and the testator knew that A. had only two living children, four being then dead leaving children,¹ or where the testator gave property to his "brothers and sisters *or* their issue," and he had two brothers and no sister living, but several were dead leaving issue,² or where he gives to brothers and has only one brother,³ the issue of members of the class dead at the date of the will have been let in.

§ 355. **The contingent character of the substituted gifts.** Where children of the members of a class are substituted for their parents who die before the termination of a life estate, the interest of the parents is contingent upon *their* surviving until the date of distribution. The question is whether the same contingency attaches to shares which the children take by substitution. If the class is a composite class, as "children then living and the issue of those deceased," only those children who survive to the date of distribution take, and the shares of all parents and children are contingent.⁴ The cases are not harmonious as to the contingency applying to substitutional shares. The question arises in this manner: A remainder is given to a class, as children or nephews, with a proviso that the children or issue of deceased members of the primary class are to take the shares which their parents would have been entitled to if they had survived to the period of distribution; and one of the class dies *before* distribution, leaving children or issue who also die *before* distribution. Is the interest which vested in the children or issue upon the death of the parent divested by their subsequent death before the actual distribution, or does it, being absolutely vested in them, go upon their death before dis-

¹ *In re Sibley's Trusts*, L. R. 5 Ch. Div. 494.

² *Gowling v. Thompson*, L. R. 11 Eq. 866.

³ *In re Jordan*, 2 N. R. 57.

⁴ *Martin v. Holgate*, L. R. 1 H. L. 175; *Orton's Trusts*, L. R. 3 Eq. 375. A remainder to children "living at

the death of the testator and to the issue of those *then* dead" vests absolutely in the issue who are living at the death of the testator, and is not divested by their death during the life tenancy, but goes to their heirs. *Cleghorn v. Scott*, 86 Ga. 496, 12 S. E. R. 876.

tribution to their heirs or next of kin? If the testator has provided that the children or issue on surviving shall at once *take absolutely*, the question is at rest. But in the majority of cases the will is silent on this point, and it is only by implication that the survivorship which attaches to the original class can be attached to the shares of the substitutionary class. The law favors an early vesting. According to the modern cases the substituted legatees take at once, on the death of the parent whom they represent, a vested interest, which continues and is not defeasible by their death before the death of the life tenant.¹ Substitutional gifts are commonly for the testator's children after a life estate in his widow, and he, desiring to keep each child's share in his family, gives it, in case the child shall not survive to take it, to his issue or children as purchasers. By making the interest in the original class dependent upon the child surviving the life tenant, he puts it out of his power to alienate it and preserves it for his children. It is not material that the members of the original class do not survive, for in that event their issue is provided for. But this provision is valueless if the issue are to part with it merely because they happen to die *before* the life tenant, when, having married and had children, their widow or offspring may need it most.²

¹In *re* Turner, 2 Drew. & Smale, 501; *Hodgson v. Smithson*, 21 Beav. 354; *Reiff's Appeal*, 124 Pa. St. 145, 16 Atl. R. 636. *Contra*, *Masters v. Scales*, 18 Beav. 60; *Merrick's Trusts*, L. R. 1 Eq. 551.

²In *re* Wildman's Trusts, 1 Jo. & Hem. 802; In *re* Pell's Trusts, 8 D. F. & J. 298; *Bailey v. Love*, 67 Md. 592, 11 Atl. R. 280. Where a child of any member of a class takes an *original* share and he has died before *his* parent, the representatives of the child will take. *Lanphier v. Buck*, 2 Dr. & Smale, 484, 84 L. J. Ch. 660; In *re* Smith's Trusts, L. R. 7 Ch. Div. 665; *Bailey v. Love*, 11 Atl. R. 280, 67 Md. 592, 599; *Cody v. Bunn*, 18 Atl. R. 857, 46 N. J. Eq. 181. See also cases cited *ante*, §§ 350, 351.

CHAPTER XVII.

MOULDING THE LANGUAGE OF THE WILL.

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| <p>§ 356. General considerations.</p> <p>357. The later of repugnant clauses prevails.</p> <p>358. Gift in clear and positive terms not cut down by later vague and general language.</p> <p>359. The attempt to reconcile apparently inconsistent clauses must be made.</p> <p>360. Specific devise of same land to several in fee-simple.</p> <p>361. Rejecting meaningless and repugnant words and clauses.</p> <p>362. The transposition of words and clauses.</p> <p>363. Caution is to be employed in altering language of the testator.</p> | <p>§ 364. Adding and supplying words and clauses.</p> <p>365. When words may be supplied on inference from the context.</p> <p>366. When the word "and" is substituted for "or" in death during minority <i>and</i> without issue.</p> <p>367. The intention to create an estate on failure of issue sustained by supplying words.</p> <p>368. Supplying words in case of gifts which are to vest at majority.</p> <p>369. The punctuation of the will.</p> <p>370. Scandalous matter may be erased from will on probate.</p> |
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§ 356. General considerations.—The rule that the testator's intention is only to be ascertained from the language of the will *as he leaves it* must be taken with this qualification: that the courts are, within certain limits, at liberty to mould its language into such shape as will, upon the whole, best show that intention. The power of reforming the language of the will has been liberally exerted, and the present tendency is to extend its operation. Whether this tendency is to be encouraged is for the courts to determine. But the spread of popular education among the laity, and the ease and increasing frequency with which professional assistance in drafting wills is secured, rendering it more probable that the intention of the testator shall be accurately and technically expressed, are pertinent facts to be considered in this connection. But, on the other hand, the vast increase in and the wide distribution of wealth, with its attendant complexity of testamentary disposition, in order that its enjoyment may be permanently secured

to the beneficiaries in all the varying circumstances of life, should not be lost sight of, as calculated to open opportunities for inaccurate expressions and omissions of intention. Of course, inconsistent and irreconcilable dispositions of the same property in the same will, one of which must be rejected, are not here referred to; we mean those complicated dispositions of property among the relatives and family of the testator in which, though the general intention is clear, by some inadvertence a minor provision may be omitted with the result of a partial intestacy. To what extent the courts may overcome the difficulties of the latter case is pointed out in this chapter.

§ 357. **The later of repugnant clauses prevails.**—The application of the rule that the intention of the testator is to be ascertained in every instance, and that when ascertained it is to be carried out as nearly as possible, is very difficult under some circumstances. We will suppose a case in which the testator in one clause of his will devises or bequeaths property absolutely and in clear and unambiguous terms to *A. and his heirs*; and in a subsequent clause of the *same* will devises the *same* property, in language equally clear, to *A. for his life, and after his death to B. and his heirs*. Now it is obvious that either of these clauses, taken alone, and assuming that the other did not exist, is clear and intelligible, and expresses a definite intention upon the part of the testator which may be effectuated. But taken together they are incurably repugnant, and both cannot stand.

The impossibility of reconciling such clauses is particularly apparent where both are contained in the same will; for, *as the intention which is to be sought after is that which the testator had at the moment of the execution of the will*, it will be impossible to ascertain what it is where it is expressed in language so diverse. If clauses are opposed one to the other, *i. e.*, if they are irreconcilably inconsistent and repugnant, unless some principle is discovered by which one shall be accepted as showing the intention of the testator, and the other rejected as not, it is obvious that both must be rejected, for both cannot be carried out. Under these circumstances it is a well-settled rule that the earlier clause in point of local position shall be rejected,

and the later clause shall prevail as expressing a later testamentary intention.¹

Cum duo inter se pugnancia reperiuntur in testamento ultimum ratum est is the maxim laid down by Lord Coke.² The foundation of this rule of construction, that as between two inconsistent dispositive clauses the latter is to prevail, is a presumption that the intention of the testator has altered during the drawing of the will, and that the subsequent clause for that reason represents a later intention in time, as it does in

¹ Walker v. Walker, 17 Ala. 396, 399; Flinn v. Davis, 18 Ala. 132, 136; Mansfield v. Shelton, 35 Atl. R. 271, 67 Conn. 391; Thrasher v. Ingraham, 32 Ala. 645, 660; Pace v. Bonner, 27 Ala. 307; Robert v. West, 15 Ga. 122, 141; Illinois, etc. Co. v. Bonner, 75 Ill. 315; Brownfield v. Wilson, 78 Ill. 467, 471; Smith v. Curry, 52 Ill. App. 227, 233; Evans v. Hudson, 6 Ind. 293, 296; Holdiefer v. Teifel, 51 Ind. 343, 346; Hedlebaugh v. Wagner, 73 Iowa, 601, 84 N. W. R. 439; Covert v. Sebern, 73 Iowa, 564, 568, 35 N. W. R. 636; Johnson v. Mayne, 4 Iowa, 180; Armstrong v. Crapo, 72 Iowa, 585, 590, 34 N. W. R. 437; Nona v. Meier, 47 Iowa, 607, 610; Howard v. Howard, 4 Bush (Ky.), 495, 497; Hunt v. Johnson, 10 B. Mon. (Ky.) 342, 344; Adie v. Cornwell, 8 T. B. Mon. (Ky.) 276, 279; Ball v. Ball, 40 La. Ann. 284, 3 S. R. 644; Good's Succession, 45 La. Ann. 1392, 14 S. R. 252; Pickering v. Langdon, 22 Me. 413, 429, 430; Orr v. Moses, 52 Me. 287, 289, 291; Pratt v. Rice, 7 Cush. (Mass.) 209, 213; Homer v. Shelton, 2 Met. (Mass.) 194; In re Bates, 159 Mass. 252, 34 N. E. R. 266; Iglehart v. Kirwan, 10 Md. 559, 564; Lee v. Pindle, 12 Gill & J. (Md.) 288, 305; Hollins v. Coonin, 9 Gill (Md.), 62; Hall v. Otis, 71 Me. 326, 330; Woodbury v. Woodbury, 74 Me. 413, 414; Watson v. Blackwood, 50 Miss. 15; Lippincott v. Davis (N. J., 1894), 28 Atl. R. 587; Rogers v. Rogers, 49 N. J. Eq. 98, 23 Atl. R. 125; Weiler v. O'Brien, 23 N. Y. Supp. 366; Sweet v. Chase, 2 N. Y. 73, 79; Norris v. Beyea, 13 N. Y. 284; Van Nostrand v. Moore, 52 N. Y. 12, 20; Parks v. Parks, 9 Paige (N. Y.), 107, 124; Covenhoven v. Shuler, 2 Paige (N. Y.), 123; Jones v. Paschall, 1 Ired. (N. C.) Eq. 430; Baird v. Baird, 7 id. 265, 269; Youngs v. McIntire, 3 Ohio, 499, 501; Baxter v. Bowyer, 19 Ohio St. 490; Davis v. Boggs, 20 Ohio St. 550, 565; Stickle's Appeal, 29 Pa. St. 234, 236; Snively v. Stover, 78 Pa. St. 484; Hiestand v. Meyer, 150 Pa. St. 501, 24 Atl. R. 749; Ulrich's Appeal, 86 Pa. St. 336, 390, 2 W. N. C. 550; Sullivan v. Strauss, 28 Atl. R. 1020, 161 Pa. St. 145; Cheetham v. Muhlen, 19 Atl. R. 547, 26 W. N. C. 198, 133 Pa. St. 309; Oyster v. Knull, 137 Pa. St. 443, 20 Atl. R. 624, 26 W. N. C. 449; Bailey v. Hawkins, 18 R. I. 573, 27 Atl. R. 512; Conant's Ex'r v. Palmer, 63 Vt. 310, 2 Atl. R. 1101; Smith v. Bell, 6 Peters (31 U. S., 1832), 74; Cro. Eliz. 9, case 2; Sayer v. Sayer, Fra. Ch. 393; Blamire v. Geldart, 16 Ves. 314; Ulrich v. Litchfield, 2 Atk. 372; Constantine v. Constantine, 6 Ves. 100, 102; Doe v. Amlot, 4 Mee. & W. 599; Spence v. Handford, 4 Jur. (N. S.) 987, 27 L. J. Ch. 767; Brine v. Ferrier, 7 Sim. 549; Brocklebank v. Johnson, 20 Beav. 205, 213; Herbert v. Thomas, 3 Ad. & Ell. 122, 129; Crone v. Odell, 1 Ba. & Ba. 446, 3 Dow, 61, 69; Sherrat v. Bentley, 2 My. & K. 149; In re Brooks (1865), 3 Dr. & Sm. 362, 364.

² Co. Lit. 112, b.

point of locality in the instrument, and hence is the last will. This presumption of an alteration of intention, which in the majority of instances is nothing more than a fiction, is an example of the many fictions which are well recognized as performing a very important part in the law of wills. The necessity for its creation and application as a rule of construction doubtless arose from the very rigid application of the rule that parol evidence is never to be received to show the intention of the testator, but that his intention must always be ascertained from the language of the will. Where the language of the will in its entirety is repugnant, it is useless to seek for light from the context; for, though each part is clear and intelligible, all parts taken together express no definite or practical intention. Here the context, which in other cases is a useful means of clearing up obscurity, itself breeds the difficulty. It being impossible, because of the doubtful meaning of the will as it stands, to put it in execution *in toto*, we must cut out and reject a portion of it in order that the residue may be carried into effect.

§ 358. Gift in clear and positive terms not cut down by later vague and doubtful language.— We have seen that, in order that the latter of two inconsistent clauses shall prevail, causing the rejection of the former, it must appear that both *are equally and clearly expressive of a contrary intention, so that it is impossible that both shall be carried out.*¹ Some irreconcilable repugnancy must exist between the two. Hence, where an absolute gift is given in clear and expressive, or, as sometimes expressed, in positive and decisive language, the rule of construction is that the interest thus given shall not be taken away, cut down, limited or diminished by subsequent vague and general expressions.² In other words, any subsequent expression of intention by the testator must, in order to limit the prior gift, be equally clear and intelligible, and indicate an intention to that effect with reasonable certainty.³

¹ *Ante*, § 357.

² *Post*, § 359; see also § 689.

³ *Flinn v. Davis*, 15 Ala. 132, 135; 45 N. E. R. 820; *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. R. 465; *Sturgis v. Work*, 123 Ind. 134, 138; *Rogers v. Hovey v. Walbank*, 100 Cal. 192, 34 Pac. R. 650; *Robert v. West*, 15 Ga. 746; *Bailey v. Sanger*, 108 Ind. 264, 122; *Howe v. Howe*, 152 Ill. 252, 38 N. E. R. 1088; *Wilson v. Turner* (Ill.),

Thus we will suppose, for example, that a testator devises land to A. and his heirs forever (which, it is admitted, confers a fee-simple upon A.), and then proceeds to place restrictions upon the power of A. to convey or encumber the land. He may

- 268; *Hockstedler v. Hockstedler*, 108 Ind. 506, 510, 9 N. E. R. 467; *O'Boyle v. Thomas*, 116 Ind. 243, 248, 19 N. E. R. 112; *Bruce v. Bissell*, 22 N. E. R. 4, 119 Ind. 525, 531; *Goudie v. Johnston*, 109 Ind. 430; *Bona v. Meier*, 47 Iowa, 607, 610; *Heidlebaugh v. Wagner*, 73 Iowa, 601, 34 N. W. R. 439; *Stivers v. Gardner*, 88 Iowa, 307, 311; *Killmer v. Wuchner*, 74 Iowa, 359, 37 N. W. R. 359; *Jordan v. Woodin*, 93 Iowa, 453, 463; *Bills v. Bills*, 80 Iowa, 270, 45 N. W. R. 748; *Barth v. Barth* (Ky.), 38 S. W. R. 511; *Briscoe v. Briscoe* (Ky.), 32 S. W. R. 212; *Adie v. Cornwell*, 3 T. B. Mon. (Ky.) 279; *Ramsdell v. Ramsdell*, 21 Me. 287, 293; *Deering v. Tucker*, 55 Me. 284, 289; *Ilsley v. Ilsley*, 80 Me. 23, 12 Atl. R. 796; *Loring v. Hayes*, 86 Me. 351, 357, 29 Atl. R. 1093; *Wallace v. Hawes*, 79 Me. 177, 8 Atl. R. 885; *Pue v. Pue*, 1 Md. Ch. 382, 385; *Combs v. Combs*, 67 Md. 11, 8 Atl. R. 757; *Jones v. Jones*, 25 Mich. 401, 404; *Wilson v. Wilson*, 45 N. J. Eq. 17, 16 Atl. R. 269; *Rodenfels v. Schumann*, 45 N. J. Eq. 383, 387, 17 Atl. R. 688; *Mandlebaum v. McDonell*, 29 Mich. 78; *Ide v. Ide*, 5 Mass. 500; *Burbank v. Whitney*, 24 Pick. (Mass.) 146; *Collins v. Wickwire*, 162 Mass. 143, 144; *Kelly v. Meins*, 135 Mass. 231, 235; *Knight v. Knight*, 162 Mass. 460, 461; *Gleason v. Fayerweather*, 4 Gray (Mass.), 348, 351; *Veeder v. Meader*, 157 Mass. 413, 32 N. E. R. 358; *Ladd v. Whitney*, 117 Mass. 201, 202; *Barrett v. Marsh*, 126 Mass. 213, 215; *Olney v. Balch*, 28 N. E. R. 258, 154 Mass. 318; *Moffatt v. Cook*, 23 N. E. R. 236, 150 Mass. 529; *Foster v. Smith*, 156 Mass. 379, 382, 31 N. E. R. 491; *Watson v. Blackwood*, 50 Miss. 155; *Small v. Field*, 102 Mo. 104, 14 S. W. R. 815; *Jackson v. Coleman*, 2 Johns. (N. Y.) 291; *Helmer v. Shoemaker*, 22 Wend. (N. Y.) 186; *Norris v. Beyea*, 13 N. Y. 273, 286; *Tyson v. Blake*, 23 N. Y. 558, 563; *Outhout v. Rogers*, 13 N. Y. Supp. 120, 59 Hun, 97; *In re Porter's Estate*, 18 N. Y. S. 820; *In re Congregational Society*, 64 Hun, 163; *Wieting v. Billinger*, 8 N. Y. S. 361, 50 Hun, 324; *Barheydt v. Barheydt*, 20 Wend. (N. Y.) 576; *Parks v. Parks*, 9 Paige (N. Y.), 107; *Meehan v. Brennan*, 45 N. Y. Supp. 57; *Clay v. Wood*, 36 N. Y. Supp. 317, 91 Hun, 398; *Haight v. Pine*, 39 N. Y. Supp. 511, 3 App. Div. 434; *In re Jewett's Estate*, 25 N. Y. S. 1109, 5 Misc. R. 557; *Banzer v. Banzer*, 30 N. Y. S. 803, 32 id. 266, 10 Misc. R. 810; *In re Gilbert*, 11 N. Y. S. 743; *Thomson v. Hill*, 87 Hun, 111, 33 N. Y. S. 810; *Davis v. Boggs*, 20 Ohio St. 550, 565; *Seibert v. Wise*, 70 Pa. St. 147; *Homet v. Bacon*, 126 Pa. St. 176, 17 Atl. R. 584; *Kieffel v. Kepple*, 33 Atl. R. 1043, 37 W. N. C. 483, 173 Pa. St. 181; *Ahl v. Bosler*, 34 Atl. R. 805, 175 Pa. St. 526; *Schott's Estate*, 78 Pa. St. 40; *Shriner's Appeal*, 53 Pa. St. 106; *Hester v. Hester*, 2 Ired. Eq. 530; *Crissman v. Crissman*, 5 Ired. (N. C.) L. 498, 501; *Gillmer v. Daix*, 21 Atl. R. 659, 144 Pa. St. 505; *Good v. Miller*, 22 Atl. R. 1032, 144 Pa. St. 287; *Rea v. Bell*, 147 Pa. St. 118, 23 Atl. R. 349; *Evans v. Smith*, 31 Atl. R. 346, 166 Pa. St. 625, 36 W. N. C. 144; *Barney v. Arnold*, 15 R. I. 78, 80; *Stead v. Manton*, 18 R. I. 163, 23 Atl. R. 1098; *Bradley v. Carnes*, 94 Tenn. 27, 30; *Meachan v. Graham* (Tenn.), 39 S. W. R. 12; *Stowell v. Stowell*, Ex'r, 59 Vt. 494, 8 Atl. R. 738; *Chaplin v. Doty*, 15 Atl. R. 362, 60 Vt. 712; *Judevine v. Judevine*, 61 Vt. 587, 18

do this, *first*, by a direction that A. shall have no power either to sell or to mortgage the land; *second*, he may direct that the land shall not be liable to execution for A.'s debts; or *third*, he may direct that it shall devolve upon some particular person on A.'s death. It is obvious, if the primary devisee has an absolute power of disposing of the property conferred on him, as he would have if a fee-simple were devised to him, that the testator has thus deprived himself of all power to control or limit A. in the exercise of the absolute power of disposal by giving him the fee in clear and intelligible language. Here no question of repugnancy arises. Where, in a subsequent part of the will, he places restrictions upon its exercise by vague language which does not expressly create a life estate, the two clauses are not repugnant, *because they are not equally clear*. For this reason the latter is rejected.¹

The above considerations and the rule which they sustain are applicable to the case of a gift in general terms of property to a person with a power annexed permitting him to use, enjoy or consume the property absolutely or in any manner whatever, with a devise *over of "what remains."* The distinction is between such a gift and a gift *expressly for life, with a power of disposal*. In the former case the absolute fee created by the clear devise is not cut down to a life estate by the devise over of what remains; for the rule is well settled that where lands or personal property are devised in indeterminate language, from which an estate for life might result by implication, and language creating an absolute power of disposal is added, the es-

Atl. R. 778; Hall v. Palmer, 87 Va. 354, 12 S. E. R. 618; Bowen's Adm'r v. Bowen's Adm'r, 87 Va. 438, 12 S. E. R. 885; Bell v. Humphrey, 8 W. Va. 18; Wilmoth v. Wilmoth, 12 S. E. R. 731, 34 W. Va. 426; Zillmer v. Landguth, 94 Wis. 607, 609; Potter v. Couch, 141 U. S. 296; Clavering v. Ellison, 3 Drew. 451, 26 L. J. Ch. 335; In re Larkin, 2 Jur. (N. S.) 229; Davis v. Bennett, 30 Beav. 226; Walsley v. Foxhall, 1 D. J. & S. 605; Crozier v. Crozier, L. R. 15 Eq. 232; In re Elliott (1896), 3 Ch. 353.

¹ Flinn v. Davis, 13 Ala. 132, 135;

O'Boyle v. Thomas, 19 N. E. R. 112, 116 Ind. 243; Bona v. Meier, 47 Iowa, 607, 610; Ramsdell v. Ramsdell, 21 Ma. 287, 293; Deering v. Tucker, 55 Ma. 284, 289; Loring v. Hayes, 86 Me. 351, 357; Combs v. Combs, 67 Md. 11; Ladd v. Whitney, 117 Mass. 201, 202; Norris v. Beyea, 13 N. Y. 273, 276; Tyson v. Blake, 23 N. Y. 558; Davis v. Boggs, 20 Ohio St. 550, 565; Gillmer v. Daix, 141 Pa. St. 505, 21 Atl. R. 659; Judevine v. Judevine, 18 Atl. R. 778, 61 Vt. 587. This matter is treated *post*, §§ 491, 522.

tate will be a fee or absolute interest. Such being the case, the subsequent gift of what remains does not reduce it to a life estate. On the other hand, where the estate is expressly for life, a mere power of disposal does not enlarge it to a fee, and a devise of "what remains" is consistent and valid.¹

§ 359. The attempt to reconcile apparently inconsistent clauses must be made.—The rule that of two apparently repugnant clauses the former ought to be rejected as having been revoked by the latter is regarded and applied with caution. In order that it shall apply at all, it must clearly appear that the two clauses are in fact, as well as apparently, repugnant and irreconcilable. The rule, so far as it involves rejecting any part of the will, is not to be invoked lightly or without good reason. It is by no means a ready-made expedient in every case of hard construction. If the two clauses cannot consistently stand together, the latter prevails; but it must first be certainly ascertained that both clauses cannot stand. Every possible effort should be made by the court to reconcile the clauses seemingly repugnant, and to give effect to the whole will; for the presumption is that the testator *meant something by every sentence and word in his will*, and no court is justified in rejecting any portion of it until it is *positively assured that the portion which it rejects cannot be reconciled with the general intention of the testator as expressed in some other portion of the will.*² And even where the general rule of re-

¹ See *post*, §§ 686, 689.

² *Stallsworth v. Stallsworth*, 5 Ala. 143, 147; *Pace v. Bonner*, 27 Ala. 307; *Thrasher v. Ingraham*, 82 Ala. 645, 660; *Jones v. Doe*, 1 Scam. (Ill., 1837), 276, 280; *Brownfield v. Wilson*, 78 Ill. 467, 471; *Rountree v. Talbot*, 88 Ill. 246; *Dawes v. Swan*, 4 Mass. 215, 216; *Homer v. Shelton*, 2 Met. (Mass.) 194, 199; *Iglehart v. Kirwan*, 10 Md. 559, 564; *Stebbins v. Stebbins*, 86 Mich. 474; *Watson v. Blackwood*, 50 Miss. 15, 21; *Pue v. Pue*, 1 Md. Ch. 382, 385; *Covenhoven v. Schuler*, 2 Paige (N. Y.), 122; *Trustees v. Kellogg*, 16 N. Y. 83, 89; *Van Nostrand v. Moore*, 52 N. Y. 12, 21; *Marsh v. Hague*, 1 Edw. Ch. (N. Y.) 174, 181; *Van Vech-*

ten v. Keator, 68 N. Y. 52, 55; *Roe v. Vingut*, 117 N. Y. 204; *Taggart v. Murray*, 53 N. Y. 233; *Mellen v. Mellen*, 84 N. E. R. 925, 139 N. Y. 210; *Graham v. New York Life Ins. & Trust Co.*, 46 Hun, 261; *Sweeney v. Warren*, 6 N. Y. S. 575; *Baird v. Baird*, 7 Ired. (N. C.) Eq. 265, 269; *Shreiner's Appeal*, 53 Pa. St. 106, 107; *Jones v. Strong*, 142 Pa. St. 496, 502, 21 Atl. R. 981; *Ferry's Appeal*, 102 Pa. St. 207; *Sheet's Appeal*, 83 Pa. St. 213; *Price v. Cole*, 83 Va. 343, 2 S. E. R. 200; *Conant's Ex'rs v. Palmer*, 63 Vt. 310, 21 Atl. R. 1101; *Hibbard v. Hulbert*, 10 Vt. 173, 180; *Briggs v. Penny*, 3 De G. & Sm. 539; *Brocklebank v. Johnson*, 20 Beav. 206;

pugnancy is applied of necessity, and the latter of the two inconsistent clauses is permitted to prevail over the former, it is a settled rule that the earlier of the two clauses will not be disturbed or rejected any further than is absolutely necessary to carry out the presumed intention of the testator as shown in the latter clause.¹

And it is also a well-settled rule of construction that the general intention of the testator, to be ascertained from the whole will, shall prevail over a particular intention expressed in a part of it, where there is a repugnancy between them. Thus, if it shall appear that the general intention is to make an equal division of all the property belonging to the testator, such an intention will prevail over a particular clause favoring one individual at the expense of another.²

§ 360. Specific devise of same land to several.—Contradictory devises of land in fee-simple are very frequent instances of repugnancy, and occur under the following circumstances: The testator devises a particular piece of property, or all his property, whether real or personal, to A. and his heirs absolutely, and in a subsequent clause devises the same property to B. and his heirs absolutely. Apparently such an example of a dissimilar and contradictory disposition of the same property con-

Sipperson v. Tower, 1 Y. & C. C. C. 459; Langham v. Sandford, 19 Ves. 647; In re Willcock, 1 Ch. Div. 229.

¹ Thus a devise of all the property of the testator to designated persons absolutely is not cut down by a subsequent power of sale in the executor, but the devisees take the land subject to the execution of the power when it is necessary. *Heidlebaugh v. Wagner*, 72 Iowa, 601, 34 N. W. R. 439; *post*, § 782. See cases cited in note 2, p. 490. "The rule of law that, where two clauses in a will are so totally repugnant to each other that they cannot both stand together, the last shall prevail, is incontrovertible, but it was never intended to apply to every imaginable incompatibility which ingenuity might suggest. The salutary maxim, *Ut magis valeat quam pereat*, would insure us to

make an attempt to reconcile them before we apply the rule." *Petters v. Petters*, 4 McCord (S. C.), 151.

² *Stallsworth v. Stallsworth*, 5 Ala. 143, 147; *Miller v. Flournoy*, 26 Ala. 724, 726; *Thrasher v. Ingraham*, 32 Ala. 645, 660; *Robert v. West*, 15 Ga. 122, 141; *Langford v. Langford*, 79 Ga. 520, 4 S. E. R. 900; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185; *Cook v. Holmes*, 11 Mass. 523, 532; *Watson v. Blackwood*, 50 Miss. 15, 21, 23; *Lassiter v. Wood*, 63 N. C. 363; *Happook v. Tucker*, 1 Hun (N. Y.), 132, 135; *Parks v. Parks*, 9 Paige (N. Y.), 107, 118; *Roe v. Vingut*, 117 N. Y. 204, 212; *Hitchcock v. Hitchcock*, 35 Pa. St. 393, 399; *Shreiner's Appeal*, 53 Pa. St. 106, 108; *Snively v. Stober*, 78 Pa. St. 484, 490; *Schott's Estate*, 78 Pa. St. 40, 44; *Bell v. Humphrey*, 8 W. Va. 1, 18.

tained in the same will ought to be classified under the rule of repugnancy as it has been stated.¹ The only method apparently by which the intention of the testator can be even partially carried out would be to reject the devise to A. as having been made by mistake, or as having been revoked by reason of the alteration of the intention manifested in the devise of the same property to B. Such indeed is held to be the true rule, according to Lord Coke and the early cases,² and it would seem that, unless we invoke the rule of construction by which the latter of two inconsistent testamentary dispositions is permitted to prevail over the former, the will would be void for repugnancy. But another solution of the difficulty has been discovered, by which the inconsistent clauses are *partially reconciled* and both beneficiaries enabled to participate in the bounty of the testator. It has been determined that under the circumstances described both devisees *would take concurrently*, that is, they would take as co-tenants.³

The question was considered by Lord Brougham, who, while admitting the general force and application of the rule of construction which rejects the former of two inconsistent dispositions, held that in the case of two devisees in fee of the same property both might take concurrently.⁴ Assuming that the devisees take as co-tenants, the question is, do they take as joint tenants, or do they take as tenants in common? It is apparent that there is nothing in the language of the clauses giving each

¹ § 359.

² Co. Lit. 112; Plow. 541.

³ Leon. 11, pl. 27; 8 Vin. Abr. 152, pl. 8; Fane v. Fane, 1 Vern. 30; Baird v. Baird, 7 Ired. (N. C.) 265, 269.

⁴ In determining the case of *Sherat v. Bentley*, 10 My. & K. 165, he said as follows: "If in one part of a will an estate is given to A., and afterwards the same testator gives the same estate to B, adding words of exclusion, as, 'not to A.,' the repugnance would be complete, and the rule would apply. But if the same thing be given first to A. and then to B, unless it be some indivisible chattel, as in the case which Lord Hardwicke puts in *Ulrich v.*

Litchfield, the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule as laid down by Lord Coke, and recognized by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety; although had the second gift been in a subsequent will, it would, I apprehend, work a revocation."

a fee absolutely to determine this question. At common law joint tenancy is always preferred, and under the circumstances of devises in fee to both persons, it is very clear that a joint tenancy is nearer to the intention of the testator than would be a tenancy in common.¹ And at common law every co-tenancy was presumed to be joint tenancy, where nothing was said as to its character, while it required express language to create a tenancy in common.²

§ 361. Rejecting meaningless and repugnant words and clauses.—If the reader has perused the last three sections with care he will have gathered that, in construing a will, it is sometimes permissible for a court to reject words or clauses which are either meaningless, and hence superfluous; that is, which do not indicate *any* intention, or which are clearly repugnant to and contradictory of the general intention.

The position of words or clauses is not always controlling in determining whether they shall be retained or rejected. The grand and leading rule of construction, that the intention of the testator is to be ascertained from the whole will, is paramount to that by which the earlier of two irreconcilably inconsistent clauses is expunged. The most important class of cases in which words or phrases are rejected, regardless of their position, is that which comprises instances in which the testator gives an absolute interest in property in clear, positive and express terms, and afterwards attempts to limit such interest or cut it down by subsequent vague and general expressions.³ A very simple example of this occurs in the case of a devise to A. *and his heirs*, “for their lives, which,” said the court in rejecting the latter words, “merely shows ignorance on the part of the testator as to the manner of describing how the persons whom he means to benefit would enjoy the property.”⁴

¹ See *post*, § 533.

² *Ulrich v. Litchfield*, 2 Atk. 372, 14 Vin. Abr. 485, pl. 2, Cro. El. 9, Co. Lit. 21, A., N.; *post*, § 534. In the United States it is extremely doubtful whether the English rule permitting two devisees in fee to take concurrently would be recognized. The general rule of repugnancy

would be applied, and the earlier of the two clauses would be stricken out.

³ *Ante*, § 353.

⁴ *Doe d. Cotton v. Stenlake*, 12 East, 515, 516. “The words ‘during their lives’ are merely the expression of a man ignorant of the manner of describing how parties whom

Though words which are mere surplusage, or which are unnecessary, or which are repugnant to the general intention, may be rejected, it is perhaps necessary to say that the judicial power of rejecting, changing or supplying words is one that should be exercised with a great deal of caution. The power of a court of chancery to construe wills cannot be invoked to reform them by eliminating words or phrases and supplying others to make the instrument conform to what may be supposed by the court to have been the real intention of the testator. No part of the will should be rejected if the whole will can be supported. Words ought not to be rejected merely because *the court may conjecture* that they have no proper place in the will, that they were inserted ignorantly or inadvertently, or because the court may think that the will appears to be more reasonable without them. The court is not to make a will for the testator by supplying words omitted by him, nor to revoke one by rejecting his words or phrases. Every effort should be made to reconcile all parts of the will before any portion of it is rejected, and nothing should be rejected which can be

he meant to benefit would enjoy the property, for whatever estate of inheritance the heirs of the daughter might take, they could in fact only enjoy the benefit of it 'for their lives.'" By Lord Ellenborough, in *Cotton v. Stenlake*, 12 East, 515, 516. So held in a gift to A. and his heirs and assigns, to be enjoyed "during his life." *Doe d. Herbert v. Thomas*, 3 Adol. v. Ellis, 128, 129, 4 Nev. & M. 696. To A. for her life, and her heirs the issue of her body, forever during the term of their natural lives. "Heirs forever cannot take during their natural lives." *Reece v. Steele*, 2 Sim. 233, 236. To A. for life, and after her death to B. and the heirs male of his body "during their respective lives severally and successively." *Hugo v. Williams*, L. R. 14 Eq. 224, 226. And see also *Seaward v. Willock*, 5 East, 198; *Mortimer v. West*, 2 Sim. 274; *Monypenny v. Dering*, 2 De M. & G. 145; *Barney v. Arnold*, 15 R. L. 78, 80. The

following examples of the rejection of words illustrate the rule: The word "aforesaid" was rejected in a gift to nephews "aforesaid" where none had been previously mentioned. *Campbell v. Bouaskell*, 27 Beav. 325. The words "dying without issue" have been rejected. *Lunn v. Osborne*, 7 Sim. 56, 61. In the case of a direction to divide among legatees named, the words "living at the death of my wife" were stricken out. *Smith v. Crabtree*, L. R. 6 Ch. Div. 591, 596. A., B. and C., and their respective heirs and assigns, were appointed as executors. The testator gave his property to them, "their *respective* heirs and assigns;" and power of sale to them, their *respective* heirs and assigns; and required them, their *respective* heirs and assigns, to pay his debts. The court rejected "*respective*" and held that the two survivors could sell. *Jones v. Pierce*, 11 Sim. (1841), 557, 567.

reconciled with the general intention manifest from the whole will. It is only in the clearest cases that courts will undertake to substitute or change the words of a will.¹

§ 362. **The transposition of words and clauses.**—It is a very well established rule of construction that words and clauses, and even whole paragraphs, otherwise insensible, may be *transposed in construing a will*, if by so doing the intention of the testator is to be ascertained and the will carried out. It has often been repeated in the course of this work that the intention of the testator is to be ascertained from the whole will; and, such being a cardinal rule of construction, the local position in the will of any particular phrase or clause is not very material. A transposition is always permitted if words or phrases which, in their original position, are either contradict-

¹ *Leavens v. Butler*, 9 Port. (Ala., 1839), 380; *Wood's Estate*, 36 Cal. 75, 81; *Howe v. Howe*, 152 Ill. 252; *Whitcomb v. Rodman*, 156 Ill. 118, 125; *Huffman v. Young*, 170 Ill. 290, 49 N. E. Rep. 570; *Shimer v. Mann*, 99 Ind. 190, 196; *Gibson v. Seymour*, 102 Ind. 485, 490; *Sturgis v. Work*, 122 Ind. 134, 135; *Walters v. Bishop*, 122 Ind. 516, 519; *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. R. 465; *Rogers v. Winklepeck*, 143 Ind. 373, 42 N. E. R. 746; *Killmer v. Wuchner*, 74 Iowa, 359; *Jordan v. Woodin*, 93 Iowa, 453, 463; *Latham v. Latham*, 80 Iowa, 293, 298; *Stewart v. Stewart*, 96 Iowa, 620, 627, 65 N. W. R. 976; *Augustus v. Seabolt*, 8 Met. (Ky.) 156, 159; *Ilaley v. Ilaley*, 80 Me. 23; *Loring v. Hayes*, 86 Me. 351, 857; *Bartlet v. King*, 12 Mass. 536, 542; *Hall v. Hall*, 123 Mass. 120; *Ladd v. Whitney*, 117 Mass. 201, 203; *Barrett v. Marsh*, 126 Mass. 213, 215; *Jameson's Appeal*, 1 Mich. (1844), 99; *Palmer v. Palmer*, 65 Mich. 655; *Mandlebaum v. McDonnell*, 29 Mich. (1874), 78; *Combs v. Combs*, 67 Md. 11, 8 Atl. R. 757; *Kimble v. White*, 50 N. J. Eq. 28, 24 Atl. R. 400; *Wilson v. Wilson*, 45 N. J. Eq. 17, 16 Atl. R. 269; *Wilson v. Wilson*, 19 Atl. R. 132, 45 N. J. Eq. 321; *Pue v. Pue*, 1 Md. Ch. 382, 385; *Mason v. Jones*, 2 Barb. (N. Y.) 229; *Sweet v. Chase*, 2 N. Y. 73, 79; *Norris v. Beyea*, 13 N. Y. 273, 283; *Tyson v. Blake*, 22 N. Y. 558, 563; *Roseboom v. Roseboom*, 81 N. Y. 356, 359; *Clark v. Leupp*, 88 N. Y. 228, 231; *Campbell v. Beaumont*, 91 N. Y. 464, 468; *Byrnes v. Stillwell*, 103 N. Y. 453, 460; *Crain v. Wright*, 114 N. Y. 307, 311; *Crissman v. Crissman*, 5 Ired. (N. C.) L. 498, 501; *Urich's Appeal*, 86 Pa. St. 386, 390; *Schott's Estate*, 78 Pa. St. 40, 44; *McKeenan v. Wilson*, 53 Pa. St. 74, 77; *Seibert v. Wise*, 70 Pa. St. 147, 149; *Homet v. Bacon*, 126 Pa. St. 176, 17 Atl. R. 584; *Kieffel v. Kepple*, 33 Atl. R. 1043, 173 Pa. St. 181; *Ahl v. Bosler*, 175 Pa. St. 526; *Schmidt's Estate*, 185 Pa. St. 579, 585, 40 Atl. R. 93; *Barney v. Arnold*, 15 R. I. 78, 80; *Stead v. Munton*, 18 R. I. 163; *Wooton v. Redd*, 12 Gratt. (Va.) 196; *East v. Garratt*, 84 Va. 523, 9 S. E. R. 1112; *Wright v. Page*, 10 Wheat. (23 U. S., 1825), 204, 239; *Giles v. Little*, 104 U. S. 291; *Finlay v. King*, 8 Pet. (28 U. S., 1830), 346; *Jesson v. Wright*, 2 Bligh, 1; *Mellish v. Mellish* (1798), 4 Ves. 45, 48, 50; *Hampshire v. Pierce*, 2 Ves. 216; *Brocklebank v. Johnson*, 20 Beav. 205, 213; *Harvey v. Harvey*, 5 Beav. 134, 137; *Holmes v. Cradock*, 3 Ves. 317, 319.

ory or meaningless, may thereby be harmonized, rendered consistent with one another, and given their appropriate meaning. Of course the form and order of the language in which the testator has originally expressed himself should not be interfered with lightly or without reason. He will be presumed to have adopted the arrangement and collocation of words which will best express his intention. The necessity for a transposition of his language must appear either from the will itself or by the introduction of proper parol evidence; and if the court is satisfied that the intention of the testator, gathered from the whole will, requires that its language shall be transposed, it should be done.¹

¹ *Cleland v. Waters*, 16 Ga. (1855), 496, 507; *Jackson v. Hoover*, 26 Ind. (1866), 511, 521; *Augustus v. Seabolt*, 3 Met. (Ky.) 156, 159; *Pickering v. Langdon*, 22 Me. (9 Shep.) 418, 429; *Linstead v. Green*, 2 Md. (1852), 82; *Metcalf v. Framingham*, 128 Mass. 370, 376; *Latham v. Latham*, 30 Iowa, 294; *Creveling v. Jones*, 21 N. J. Law, 573, 576; *Ex parte Hornby*, 2 Bradf. (N. Y.) 420; *Covenhoven v. Shuler*, 2 Paige (N. Y.), 122, 131; *Pond v. Bergh*, 10 id. 140; *Chrystie v. Phyfe*, 19 N. Y. 344, 351; *Baker v. Pender*, 5 Jones (N. C.) L. 351; *Insurance Co. v. Stokes*, 1 Brewst. (Pa.) 486; *Sullivan v. Straus*, 161 Pa. St. 145, 150, 28 Atl. R. 145; *O'Neill v. Boozer*, 4 Rich. (S. C.) 22; *Doe v. Allcock*, 1 B. & Ald. 137, 139; *Woodburne v. Woodburne*, 8 De Gex & S. 643, 644; *Mohun v. Mohun*, 1 Sw. (1818), 201, 205; *King v. Cullen*, 2 De Gex & S. 252, 255; *Parker v. Tootal*, 11 H. L. Cases, 143; *Spark v. Purnell*, Hob. 75. "This is the ordinary and common construction in wills, not to consider exactly the order of placing words, if it would better answer the apparent intention of the testator otherwise." *Hardwicke*, Lord Chan., in *East v. Cook*, 2 Ves. 132 (1750). The following examples of the transposition of words may be given: Where a testator devised a dwelling-house and a farm, described as in the occupation of A., except one meadow; and it was proved that, though A. occupied the dwelling-house, he had occupied only a portion of the farm, and the meadow not at all, the words referring to occupation were transposed and made applicable to the dwelling-house alone; the devisee therefore took all the land except the meadow. *Marshall v. Hopkins*, 15 East, 309, 317. In *Doe d. Wolfe v. Allcock*, 1 B. & Ald. 137, Lord Ellenborough said: "The testator has thrown together a heap of words, the sense and meaning of which he did not clearly apprehend; but although the language of this will is confused, and the words are scattered in such a way as, if taken in the order in which they stand, they do not convey any meaning, yet, in favor of common sense, we may take the liberty of transposing them according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention. The labor of the argument has been to make the testator dispose of only one-third of his estate, and thereby to compel an intestacy as to the remainder; whereas, his meaning evidently was to dispose of the whole."

It is not always necessary, in order that words shall be transposed, that they shall be contradictory or insensible. The stringent rules which are applicable to rejecting or supplying words are not applicable to their transposition;¹ for, in the latter case, the phraseology of the whole will is preserved substantially as it was penned by the testator; nothing has been added to it. Hence, if it happens that the language of the will is difficult to understand in its original order, and if the intention of the testator is more easily understood by transposing the words, it should be done, though the will itself is not contradictory, and though it might be carried into *partial effect without the transposition*; for the rule is that the whole of the testator's intention must be sought after, and if carrying out the whole intention requires a transposition it should be made. Thus, where a testator gave legacies to A., B. and C., "to be paid at a certain date," it was held that the phrase "to be paid," etc., should be referred back to the legacies to A. and B. as well as to that of C.² So, where the testator was the owner of two estates, one in possession, and one in reversion under a marriage settlement, which were located in different places, and he devised the estate located at A., of which he was in actual possession, by the description of the estate located at B., of which he had the reversion, it was determined, after a comparison of all parts of the will, and on evidence of the circumstances, that the descriptions should be transposed.³ So, where the testator having two nieces, one named Mary, who had never been married, and one named Ann, who had been married but was dead, leaving two children, bequeathed half of his property to the children of his niece Mary, who was the unmarried niece, and the other half to his niece Ann, the language was transposed to carry out the intention of the testator.⁴

¹ Though a transposition of the language of the will should never be permitted unless required to effect the intention, it is clear that all arguments which are properly urged against adding to or taking from the language of the testator, and which are proper where rejecting or supplying words is in question, have no application here. The will is preserved in its entirety. Nothing that

the testator wrote is rejected and nothing of which he is not the author is inserted. The whole will is preserved, and from that, as rearranged, the intention is readily ascertained.

² Child v. Ellsworth, 2 D. M. & G. 679, 683.

³ Moseley v. Moseley, 8 East, 149.

⁴ Bradwin v. Harpur, Amb. 374, 375.

§ 363. **Caution to be employed in altering language of the testator.**—The power of the court to alter the language of the testator, where upon the face of the will such an alteration is required, is admitted; but inasmuch as an alteration of his language involves the rejection of words used by him, as well as the supplying of words not used by him, it ought to be indulged in with the greatest caution. All the considerations admitted as applicable to rejecting or supplying words are to be borne in mind;¹ and it must *not only be clear and undoubted* that he has used *the wrong words*, but it must also appear from the context what *the right words are*. The court, in construing a will, is not bound by the grammatical sense of words, and may interpret words indicating present time in a future or a past sense; or words indicating future time in a present or a past sense. Some words are so frequently misused by testators that very little argument is needed to move the court to reject them and to substitute others in their place. Thus, for example, the words “devise and bequeath” and “devise and legacy,” “heir” and “legatee or devisee” are used interchangeably in common parlance, and very frequently are incorrectly employed by testators unfamiliar with technical language who write their own wills.²

The cases in which the language of a will may be altered may be divided into four classes. *First*, where it is evident that the *wrong word has been employed* by the testator *through mere inadvertence*. Thus, “return” was altered to “remain;”³ “reviving” to “surviving,” in a gift to the “reviving son;”⁴ “living at *my* death” to “living at *her* death;”⁵ “without having issue” to “without leaving issue;”⁶ “die with children” to “die without children;”⁷ “oldest” to “youngest;”⁸ “may leave” to “may have;”⁹ and the word “majority” was read “minority” where there was a gift over in case of death “during majority,” and the property was to be delivered to the devisee on his “attainment of majority.”¹⁰ The second class of

¹ *Ante*, § 361.

² *Ante*, § 319; *post*, § 618.

³ *Den v. McMurtrie*, 4 N. J. Eq. 276.

⁴ *Pond v. Bergh*, 10 Paige Ch. (N. Y.) 140, 151.

⁵ *Horton v. Cantwell*, 108 N. Y. 251, 253, 255, 15 N. E. R. 546.

⁶ *Eastwood v. Lockwood*, L. R. 3 Eq. 487, 495.

⁷ *Johnson v. Johnson*, 128 Ind. 93.

⁸ *Tayloe v. Johnson*, 63 N. C. 383.

⁹ *Du Bois v. Ray*, 35 N. Y. 162.

¹⁰ *State v. Joyce*, 48 Ind. 310, 314. So in the case of a gift to “A., the

cases includes those where, though the testator's intention is apparent from the whole will, he has, *by reason of bad grammar, failed to express it in the clause under consideration*. So, where the bequest was to A. and B., and if they die without issue, "to my children who may survive or to the descendants of *their* children, to be equally divided," "and" will be substituted for "or" and "my" for "their," in view of the apparent intention, from the whole will, of the testator to make an equal division among his own children.¹ Upon the same grounds "received" has been substituted for "receivable;"² "payable" for "paid;"³ "when" and "if" are interchangeably employed for one another;⁴ "all" for "any,"⁵ and "*her*" has been read "*their*."⁶ The third class of cases consists of those where the testator has made no mistake in the use of the words, and they are grammatically correct, but it appears *from the whole will that they do not express his real meaning*. Thus, the word "leaving," in a devise over on the death of A. "leaving no children," will be construed "having" or "having had," where it is apparent from the whole will that the testator intended to benefit A.'s posterity, though no children might survive them.⁷ And for the same reason "survivor" may be construed "other."⁸ The fourth class of cases includes all those cases where it is apparent from evidence of all the circumstances of the testator, his property and surroundings, that he

legal heirs of B. and of T., and others share and share alike," the expression "of T." was made to read "to T.," the error being apparent from other clauses in the will. *In re Swinburne*, 16 R. L. 208, 14 Atl. R. 850.

¹ *Slingluff v. Johns* (Md.), 39 Atl. R. 872.

² *Dodgson's Trust*, 1 Drew. 440; *West v. Miller*, L. R. 6 Eq. 59.

³ *Martineau v. Rogers*, 8 De Gex & G. 328; *Haydon v. Rose*, L. R. 10 Eq. 224.

⁴ *Smith v. Clark*, 3 Russ. 365.

⁵ *Godwin v. Banks* (Md.), 40 Atl. R. 268.

⁶ *Horwitz v. Norris*, 60 Pa. St. 261. See also *Wooston v. Redd*, 12 Gratt. (Va.) 196, 208. In a devise to "A. for life, or if he shall survive B, then to

C.," "or" has no meaning; it must either be erased or "and" substituted. If it was used in its proper sense, the testator had an intention in mind which he has omitted to state. To make the devise consistent, it should read, "to A. for her life, and after her death, or if she survive B, then to C." *Leach v. Micklem* (1805), 6 East, 486, 494.

⁷ *Kennedy v. Sedgwick*, 3 Kay & J. 540; *White v. Hill*, L. R. 4 Eq. 265; *Brown's Trust*, L. R. 16 Eq. 289; *In re Ball*, 40 Ch. Div. 11; *post*, § 566.

⁸ *Carter v. Bloodgood*, 3 Sandf. (N. Y.) 293, 299; *Wake v. Varah*, L. R. 2 Ch. D. 348; *Arnold's Trusts*, L. R. 10 Eq. 252; *Waite v. Littlewood*, L. R. 8 Ch. 70; *Palmer's Trusts*, L. R. 19 Eq. 320; *ante*, § 351.

has employed language which is incorrect when applied to the objects or subjects of a devise. Thus, where the testator gives property to "the two children of A.," who at the date of the will and at the death of the testator had four children;¹ or where he gives property to a person who is incorrectly described by name, occupation or residence; or where he incorrectly describes the subject-matter of the devise, the court will alter the words to conform to the actual condition of things.²

§ 364. **Adding and supplying words and clauses.**—It is permissible under certain circumstances for a court in construing a will to add to the language of the will by supplying words or phrases which the testator means to use, but which he has unintentionally omitted. In the first place, it must clearly and satisfactorily appear that the language of some part of the will does not fully express the intention of the testator, which is ascertainable from the whole will. Thus, if upon the face of the will some glaring absurdity or ambiguity is apparent, and it also appears that by the addition of other words the absurdity or ambiguity may be removed, the rule is that the words may be supplied. But, in order that this may be done, it must be apparent, from a consideration of the context, what the words are which are to be supplied; for parol evidence will not be received for the purpose of proving the words that have been omitted.³ When it has been ascertained what words were omitted, it must also satisfactorily be shown that the omission of these words was accidental and not intentional.

If words are intentionally omitted they cannot be supplied, for to do this would be to bring about a disposition by means of construction which the testator did not intend.⁴ The inference or presumption that the testator would have inserted the words which are supplied, and that their omission was accidental, must not only be strong, but it must be absolutely necessary and indubitable. The court should not indulge in

¹In *re Groom*, 66 L. J. Ch. 778, 2 Ch. (1897), 407, 77 L. T. 154; *post*, § 565. *Moran v. Moran* (Iowa, 1897), 73 N. W. R. 617.

²See §§ 911-914.

³For this reason the amount of a legacy which is left wholly blank will not be inserted, unless it is ascertainable from the context of the will. *Phillips v. Chamberlaine*, 4 Ves. 50,

⁴*Murgitroyd's Estate*, 1 Brewst. (Pa.) 317, 319. A. was appointed executor and trustee, but died. B. was appointed executor in his place. It was held that the word "trustee" could not be supplied.

guesswork or conjecture in supplying words, but should endeavor to ascertain the general intention of the testator shown by the whole will, and should supply such words and phrases only as are absolutely indispensable to carry out that general intention.

Sometimes the omission of a word or a phrase from a will is so clearly seen at first glance to have been accidental that no process of construction is required. Thus it is obvious that a bequest to A. "during her natural" means a bequest during her natural "*life*,"¹ and that a devise over, if a devisee "shall without issue," means if he shall "*die*" without issue.² So, too, there may be a manifest omission in words descriptive of the property which is devised, as in the case of a direction to pay "five hundred" to A., where it is clear that the testator has omitted the word "dollars."³

¹ Gieger v. Brown, 4 McCord (S. C.), L. 418.

² Couch v. Gorham, 1 Conn. (1814), 39.

³ Schweigert's Will, 40 N. Y. Supp. 979; Sessoms v. Sessoms, 2 Dev. & Bat. (22 N. C.) Eq. 453. See, as supporting the general rule, Chappel v. Avery, 6 Conn. 81; Kellogg v. Mix, 37 Conn. 243; Cooper v. Cooper, 7 Houst. 488, 81 Atl. R. 1043; Cleland v. Waters, 16 Ga. 496, 507; Bishop v. Morgan, 82 Ill. 351, 355; Penn v. Fogler, 77 Ill. App. 865; Jackson v. Hoover, 26 Ind. (1866), 511, 518; State v. Joyce, 48 Ind. (1874), 310, 314; Hunt v. Johnson, 10 B. Mon. (49 Ky.) 342, 344; Chapman v. Oliver, 3 Burr. (Eng.) 1634; Pickering v. Langdon, 22 Me. 413, 429; Nichols v. Boswell, 103 Mo. 151, 160, 15 S. W. R. 343; Creveling v. Jones, 21 N. J. L. 573, 576; Nelson v. Combs, 18 N. J. L. 27, 38; Marsh v. Hague, 1 Edw. Ch. (N. Y.) 174, 181; Carter v. Bloodgood, 3 Sandf. (N. Y.) 293, 299; Pond v. Bergh, 10 Paige (N. Y.), 140, 152; Dew v. Barnes, 1 Jones. Eq. (N. C.) 149, 151; McKeenan v. Wilson, 53 Pa. St. 74, 76; Reid v. Hancock, 10 Humph. (Tenn.) 363; Selden v. King, 2 Call (Va.), 73, 87; Wootton v. Redd, 12

Gratt. (Va.) 196, 205; Webster v. Morris, 66 Wis. 366, 396; Schinz v. Schinz, 90 Wis. 236, 242; Radford v. Radford, 1 Keen, 486; Planner v. Scudamore, 2 Bos. & Pul. 289, 296; Townley v. Bolton, 1 My. & Kea. 148, 149; Surtees v. Hopkinson, L. R. 4 Eq. 98, 105; Phillips v. Chamberlaine, 4 Ves. 50, 57; Frith v. Wilson, 74 Law Times, 302. The following are examples of words supplied: In a provision that a child should share equally with the other children, the court inserted the words "in my estate" after "equally." Hunt v. Jackson, 10 B. Mon. (Ky.) 342, 344. The word "sons" was supplied in a clause which read: "if either of my should die without issue," coming after a gift to the two sons of the testator. Dew v. Barnes, 1 Jones (N. C.), Eq. 149, 151. The court supplied the words "except A.," where the testator, after expressly disinheriting his son A., gave all his estate to his children. Sullivan v. Straus, 28 Atl. R. 1020, 161 Pa. St. 145, 150. In a clause, "I give to A. for the maintenance of herself and of B.," the court supplied the words "the net income of my estate." Kellogg v. Mix, 37 Conn. 243, 245. In Holms v. Williams, 1 Root

The words omitted are not so apparent in all cases; for, in most instances, they are only to be ascertained after an examination of the whole will. Such cases we will now proceed to consider.¹

§ 365. When words may be supplied on inference from context.—Words or phrases of limitation are not to be supplied merely upon conjecture of an intention inferred from the context. If the several descriptive clauses of a will are separate and distinct, as where they are not connected either grammatically or by reference one with the other; and no expression of an intention to carry out a common purpose is to be found in the will, it is conjecture for the court to construe these unconnected and unrelated clauses to bring about a similarity of disposition.² If each clause is complete and clear, and the provision made by it is consistent with the others, the court of construction is not justified in supplying words to assimilate them, though by so doing a more equal, just and reasonable disposition is made of the property.³ Thus, the fact that the testator has given one person who is related to him, as, for example, his son, a devise in fee of a particular piece of property, while he gives another son, who of course is related to him in the same degree, a devise for life only, does not warrant the court in supplying words of limitation by which the life interest which the latter takes shall be enlarged to a fee-simple.⁴ Nor is a devise

(Conn., 1792), 332, "before he arrives at full age" was supplied. In *Langston v. Langston*, 2 Cl. & Fin. 194, where the testator devised his property to A. with "remainder to his second, third and fourth sons in tail," the court inserted the word "first;" and the phrase "during the lives of the several tenants for life" was supplied in *Le Compere v. Hicks*, 7 T. R. 437. So it is a general rule that where the extrinsic evidence identifying land devised shows a palpable omission in the description by courses and distances, that a portion of the description may be supplied to carry out the intention. *Thomson v. Thomson*, 21 S. W. R. 1085, 1128, 118 Mo. 56.

¹ "It is a well-settled rule of construction that all the parts of a will

are to be construed together and in relation to each other, and so as, if possible, to form one consistent whole; and that words and limitations may be transposed, supplied or rejected where warranted by the immediate context or the general scheme of the will, but not merely on conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument." The court by Burdick, J., in *Grimes v. Harmon*, 35 Ind. 198, p. 254.

² *Ante*, § 322.

³ By Lord Ellenborough, in *Right d. Compton v. Compton*, 9 East, 267.

⁴ *Spirt v. Bence*, Cro. Car. 368. See the remarks of Lord Ellenborough

for life created by indeterminate words enlarged to a fee by the fact that in the same will the testator gives the same person a fee in other property.¹ Thus, where the testator devises his house in Broadway to *A. and his heirs*, and his place in Westchester to *A.*, without *words of limitation* (by which latter devise *A.* would at common law take a life estate only),² the court is not justified in inserting the words "and his heirs," upon conjecture that the testator intended that *A.* should take the fee in both estates.³ And the fact that the testator has connected a devise to *A.*, couched in indeterminate language (by which he takes a life estate), with a devise to him in language which gives him a fee-simple, by the word "also," or "likewise," or some similar term,⁴ does not imply an intention that the devises shall assimilate.⁵ When, however, a testator divides his will into sections consecutively numbered, each containing several gifts to the same person, the last of which is followed by words of limitation conferring a fee, the words will be supplied in all the gifts contained in the section.⁶

§ 366. When the word "and" is substituted for "or" on death during minority or without issue.—It is a well-established rule that the word "*or*," when used in wills, may often

in *Compton v. Compton*, 9 East, 267. See also *Walker v. Tipping*, 9 Hare, 800.

¹ *Paice v. Archbishop of Canterbury*, 14 Ves. 366, 369; *Doe d. Child v. Wright*, S. T. R. 64.

² § 679.

³ *Right d. Mitchell v. Sidebotham*, Dougl. 759.

⁴ See *ante*, § 321.

⁵ *Paice v. Archbishop of Canterbury*, 14 Ves. 366, 369; *Doe d. Ellam v. Wesley*, 4 B. & Cr. 667; *Gower v. Towers*, 26 Beav. 81. But see 1 Mod. 130. In construing the words "and also," see *Willis v. Curtois*, 1 Beav. 198, where a gift of "carriages, horses, etc., and chattels in my house, and also household goods, furniture, pictures, plate, etc.;" and "*likewise* watches and personal ornaments," was held to include all of the household furniture of the testator. In *Grimson v. Downing*, 4 Drew. 125,

132, it is said that it does not follow, because the testator devises property in fee in a will, that he gives the same estate in a codicil.

⁶ *Fenny d. Collins v. Eustace*, 4 Maule & Sel. 58. In this case, where the clause read: "3rdly. I give to J. D. all that my house and premises at P. in the occupation of R.; I also give J. D. all my land in the occupation of T. to him, my said nephew J. D., his heirs and assigns forever," Lord Ellenborough remarked: "If it had not been for the numerical arrangement there might have been some difficulty, but that removes it. It seems clear from the context that both in the second and third clause the testator, by reserving to the close of the entire sentence the words of limitation, meant to accumulate and comprehend within those words all that he had disposed of in the preceding parts of the sentence."

be construed to mean "*and*," and *vice versa*, where, upon the face of the will, the intention of the testator seems to require the change. The cases in which this has been done are extremely numerous; and, though not entirely harmonious, still it may be said with safety that it is a well-settled rule, dating from the reign of Queen Elizabeth,¹ that in the case of a devise to A., his heirs and assigns, or in the case of any other devise by which A. takes a fee-simple, and in case of his death under the age of twenty-one years, *or* if he die without issue, then over, "*or*" will be construed "*and*." The effect of this alteration of language will be that A. will take an estate in fee-conditional, which will be defeated only upon the concurrent happening of *both* events; *i. e.*, on his death during minority and also without issue. If, therefore, A. shall reach his majority, *or* shall die under twenty-one years of age and leaving issue, the devise to him is absolute, and the devise over is defeated.

Another effect of this alteration of language, and of the substitution of "*and*" for "*or*," is to make the failure of issue a definite failure of issue, *i. e.*, a failure of issue in being at the death of A.²

¹ Soule v. Gerard, Cro. Eliz. 525.

² Tennell v. Ford, 30 Ga. 707; Kindig v. Smith, 39 Ill. 300, 305; Parrish v. Vaughan, 12 Bush (Ky.), 97; Sayward v. Sayward, 7 Me. 175, 181; Newton v. Griffith, 1 Har. & Gill (Md.), 111; Watkins v. Sears (Md.), 3 Gill, 492, 496; Dallam v. Dallam (Md., 1826), 7 Har. & J. 220; Raborg v. Hammond, 2 H. & J. 42, 54; Neal v. Cosden, 34 Md. 421, 427; Ray v. Enslin, 2 Mass. 53, 54; Hunt v. Hunt, 11 Met. (Mass.) 88; Prosser v. Hardesty, 101 Mo. 593; Den v. Mugway, 4 N. J. Eq. 330; Shimer v. Shimer, 50 N. J. Eq. 300, 24 Atl. R. 385; Nevison v. Taylor, 7 N. J. Eq. 43; Jackson v. Blanshan, 6 Johns. Ch. (N. Y.) 54; Anderson v. Jackson, 16 id. 383; Grim v. Dyer, 3 Duer (N. Y.), 354; Roosevelt v. Thurman, 1 Johns. Ch. (1814), 220; Jackson v. Reeves, 1 Wend. (N. Y., 1828), 388; Harrison v. Bowe, 3 Jones, Eq. (56 N. C., 1857), 478, 481; Hauer v. Shutz, 2 Binn. (Pa., 1809), 532; Bellzhoover v. Costem, 7 Pa. St. 13; Kelso v. Dickey, 7 Watts & S. (Pa., 1844), 279; Scanlan v. Porter (S. C., 1830), 1 Bailey, L. 427, 428; Adams v. Chaplin, 1 Hill (S. C.), Eq. 265; Barksdale v. Edwards, 2 Hill (S. C.), Eq. 184; Shand v. Rogers, 7 Rich. Eq. (S. C.) 422; Waller v. Ward, 2 Speer's L. (S. C., 1844), 786, 799; Bostick v. Lawton, 1 id. 259, 262; Brewer v. Opie, 1 Call (Va., 1798), 184, 185; Lillibridge v. Adie, 1 Mason, C. C. 298; Arnold v. Buffum, 2 Mason, C. C. 208; Belles v. Gillespie, 5 Rand. (Va., 1827), 273; Broaders v. Turner, 5 Rand. (Va., 1827), 308; Kip v. Kip, 2 Paine (U. S.), C. C. 366; Price v. Hunt, Pollexfen, 645; Barker v. Suretees, 2 Stra. 1175; Walsh v. Peterson, 3 Atk. 193; Fairfield v. Morgan, 5 B. & Pul. 30, 38; Wilkins v. Kemey's, 9 East, 366; Right v. Day, 16 East, 67, 68; Eastman v. Barker, 1 Taunt. 174, 182; In re Sander's Trusts, L. R. 1 Eq. 675, 683. As soon as the devisee

A very strong case exists for the application of this rule when the gift is to A. for life, if he shall reach his majority, with a remainder to his children; but if he shall die without leaving children, *or* during minority, then over, and A. marries and dies under age leaving a child surviving.¹ The testator, in making a disposition of this sort, has two purposes in mind. The first and the main purpose is that, if A. shall attain the age of twenty-one years (before which age he is incompetent because of his infancy to dispose of the estate), he shall take the fee-simple absolutely, irrespective of whether he shall or shall not subsequently die without leaving issue.

The secondary purpose of the testator is to benefit A.'s issue, if any survive him, and that such issue shall take; as is shown by his making the leaving of issue at the death of A. one of the contingencies by which the limitation over is to be disappointed. Now, suppose A. shall marry and die under the age of twenty-one, leaving children or other issue. If we retain the word "*or*," the intention of the testator that A.'s issue shall be benefited is defeated by the death of A. under twenty-one, though leaving issue, and the executory devise goes into effect to the deprivation of his surviving issue. But if we substitute "*and*" for "*or*" we obtain a more probable and reasonable disposition, and one which, in the majority of cases, undoubtedly harmonizes more closely with the actual intention of the testator. His intention was to confer no benefit on the person who is to take the future interest, unless it becomes impossible that both A. *and* his issue should take anything. In other words, if A. shall die during minority he must die without leaving issue who would take from their ancestor.²

attains his majority he may alienate the fee, and his issue in such event have no interest as purchasers. See cases cited.

¹ Cooke v. Mirehouse, 84 Beav. 273.

² To state this more fully, if the death of the devisee under age and his death leaving no issue are independent and distinct contingencies, upon the happening of either of which the executory devise will vest, then if the devisee marries, has issue and dies under twenty-one leaving

issue, the issue will not take because death under age is one event which would defeat the estate. This is manifestly contrary to the intention of the testator. He evidently meant that if the person who is the first object of his bounty should die without leaving children to take after him, while he was under age, and consequently while he was not capable of disposing of the property, the testator would dispose of it for him. If he reaches an age when he

This rule of construction which permits the substitution of *and* for *or* in the case of a gift over upon the death during minority *or* without issue is applied where some other contingency is connected with death without issue; for example, the word *or* will be changed into *and* where the gift over depends upon the death of the first legatee during minority, *or* without having married,¹ or during minority, unmarried, *or* without issue.²

The converse of the rule is true. "And" will not be altered to "or" in a gift to A. if he shall die under age *and* without issue. In a devise to A., and in the event of his death under twenty-one and without an heir (this word being synonymous with the word "child" or "issue," *i. e.*, without issue), the courts have refused to substitute "or" for "and."³

has the right to dispose of real estate by deed or will, and should then die leaving no children, still the devise to him has become absolute and the devise over fails. See remarks of Shaw, J., in *Parker v. Parker*, 5 Met. 134, 137. The rule applies where the original devise is to A. upon condition that he has heirs of the body and attains his majority, but in case he shall die under twenty-one *and* without issue, then over. As soon as he attains the age of twenty-one he takes an absolute fee, whether he has issue or not. *Sayward v. Sayward*, 7 Me. 210, 216.

¹ *Janney v. Sprigg*, 7 Gill, 197.

² *Framlingham v. Brand*, 3 Atk. 390, where the gift was to be with a devise over in case he should die in the life-time of A. or under the age of twenty-one and without issue. In this case A.'s devise was not defeated unless all of the events concur, that is to say, his death during the life-time of B, he being at the same time under age and leaving no issue. *Miles v. Dyer*, 5 Sim. 535, 8 Sim. 330, or in *Kelley v. Kelley*, 182 Pa. St. 131, 37 Atl. R. 830, where the devise was to be defeated in case the devisee should die during the life of

B *or* during minority, leaving no issue. The court refused to substitute *and* for *or*, holding that the devise was defeated by the death of the devisee before B, even over majority and with issue. As having a general bearing on this subject consult the chapter on Survivorship, *ante*.

³ *Butterfield v. Harkins*, 33 Me. 392, 393; *Carpenter v. Boulden*, 48 Md. 122; *Carpenter v. Heard*, 14 Pick. (Mass.) 449; *Chrystie v. Phyfe*, 19 N. Y. 344, 351; *Cheeseman v. Watson*, 8 How. (U. S.) 263; *Griffith v. Woodward*, 1 Yeates (Pa.), 316. "It would seem that the principle in question applies to every case where the gift over is to arise in the event of the preceding devisee or legatee dying under prescribed circumstances, or leaving an object who would, or at least who *might*, take a benefit derivatively through the devisee or legatee, if his interest remained undivested, and to whom, therefore, it is probable the testator intended indirectly a benefit not dependent upon the circumstances of the devisee or legatee dying under the prescribed circumstances [or not]. In this point of view it would seem to be immaterial whether the dying is confined to

Lord Hardwicke refused to alter the word "*or*" into "*and*" in the case of a devise of an estate tail; arguing that the remainder after an estate tail and on an indefinite failure of issue was valid, though such a remainder may not have been valid after a fee. He assumed that it was the intention of the testator, in devising property to A. *and* the heirs of his body or issue, by which words an estate tail was created, with a remainder to others in case A. should die under twenty-one *or* without issue, that A. and his issue should enjoy the estate as a fee tail, and that the remainder over takes effect only on an indefinite failure of issue. The distinction seems to be as follows: that where the first devise is to A. *and his heirs*, and if he should die before twenty-one *or* without issue, the refusal to change *or* into *and* will result in disappointing issue, in case of A.'s death before twenty-one with issue, which is directly contrary to what the testator intended. But if the first limitation is to A. *and* the heirs of his body or issue, with a devise over in case he shall die during minority *or* without issue, there is no necessity of changing *or* into *and*, for the failure of issue is an indefinite failure of issue. If he dies without issue during minority, before the fee tail is vested, the limitation over is valid as an executory devise. If he dies without issue after the fee tail is vested the limitation over is a valid remainder.

§ 367. **The intention to create an estate on failure of issue sustained by supplying words.**—A devise in fee to A., with a devise over if he shall die without issue, is a very common form of testamentary disposition, and the intention of the testator, on the one hand, to confer a benefit on A.'s issue if he shall have any, and, on the other, to benefit others if he shall die without issue, will be carried into effect, though he may have omitted words necessary thereto. Thus, where a testator, having given

minority, or is associated with any other contingency, as in the case of a gift to A., and if he shall die in the life-time of B, or without issue (or die without issue or intestate), then over; or whether the event is leaving issue or leaving any other object who would derive an interest or benefit through the legatee, if his or her interest was held to be absolute, as a husband or wife." Jarman on Wills, p. 508. In *Weddell v. Mundy*, 6 Ves. 341, a testator bequeathed a residue to A. absolutely, and provided that if she died under twenty-one, *or* without leaving any husband living at her death, the residue was to be paid to others "in case of A.'s death as aforesaid." "*Or*" was read *and*, and the phrase, *under age as aforesaid*, signified death without leaving any husband her surviving.

an absolute estate to A. by a devise to him and his heirs, provides that if he should die it shall go to B., the court will supply the words "without issue," after "die," in order to reconcile what would otherwise be repugnant.¹ So, in a devise to the children of the testator for life, and after their death to the heirs of their bodies, and in case of the death of either to the heirs of the others, "without such heirs" will be inserted after the words "death of either."² But words pointing to death without issue will not be supplied unless it is clear from a careful inspection of the whole will that their insertion is necessary to carry out the intention of the testator. Thus, in a devise to A. and B. "to be equally divided, share and share alike, to them and their heirs, and in case of the death of either then to the survivor, and in the case of the death of both then to others," the court refused to supply the words "without issue," and A. and B. took as joint tenants.³

A common-law rule is that dying without issue refers to an indefinite failure of issue; that is to say, it does not refer to the death of a person without leaving issue living at his death. But where from the context of the will it appears that a definite failure of issue is meant, the word "leaving" will be inserted between the words "without" and "issue," particularly where similar expressions are employed elsewhere in the will.⁴ So in the case of a provision by which A. is to receive the income of a sum during his life, and at his death the principal is to become the property of his child or children, but, in the event of his dying, the sum is to go to others, it was determined that the testator meant death without leaving any children, and accordingly the words "without leaving any children" were supplied, the effect of which was that the children of A. who survived him took the property.⁵

¹ Anon., 1 And. 33; Spalding v. (S. C., 1794), 414, 417. In Butterfield v. Hamant, 105 Mass. 338, 339, the court declined to insert "and leave no issue surviving," in a devise to B. and his heirs, and "*if he shall die*" before his father, then over.

² Young v. Harkleroad, 166 Ill. 319, 46 N. E. R. 1113; Selden v. King, 2 Call (Va.), 73, 91; Targus v. Puget, 2 Ves. 694; Hewit v. Ireland, 1 P. Wins. 427.

⁴ Shepperd v. Lessingham, Amb. 122; Pye v. Linwood, 6 Jur. 618; also *post*, §§ 849, 851.

⁵ Abbot v. Middleton, 21 Beav. 143,

³ Hamilton v. Boyles, 1 Brev. L. 7 H. L. Cas. 63.

§ 368. **Supplying words in the case of gift which was to vest at majority.**— Omissions frequently occur where words or phrases occurring in an alternative disposition are meant to be repeated. This is illustrated in the case of a devise to A. and B., and, in the event of the death of either of them without issue before he attains the age of twenty-one years, to the survivor, but *if both shall die without issue then to a third person*. It is apparent here, according to the strict terms of the devise, that if both should survive the age of twenty-one and then die without issue, the absolute interest in them would be defeated, which was clearly not the intention of the testator, because he had previously given the absolute interest to the survivor on the death of either one under majority. For this reason the words “under twenty-one” should be supplied in the last clause.¹

§ 369. **The punctuation of the will.**— That a will is couched in ungrammatical language and incorrectly punctuated are facts of little importance. The punctuation of the instrument will undoubtedly have some effect in determining its construction, and, from the time of Lord Eldon down to the present, the courts in the construction of a will have never failed to consider “the mode in which it was written,” how “dashed and stopped,”² as a guide, though not a very reliable one, for ascertaining the intention of the testator. For punctuation is never controlling. The intention is always to be ascertained exclusively from the words employed by the testator, viewed in the light afforded by the context.³ The punctuation or the lack of

¹ Wheable v. Withers, 16 Sim. 505, 508; Kirkpatrick v. Kirkpatrick, 13 Ves. 476; Holmes v. Williams, 1 Root, 332; Wurts v. Page, 19 N. J. Eq. 356. Where there was a provision that the income of the estate should be put at interest for A., who was a young child, until he attained his majority, he in the meantime to be supported and educated, but “if he should die.” then over, the court, seeing that the intention of the testator was to provide for A.’s support during his minority, and, when he attained his majority, to give him the property absolutely, inserted the

words “under the age of twenty-one years” after “die.” Pennington v. Vanhouten, 8 N. J. Eq. 272, 275.

² See the remarks of Bruce, L. J., in Manning v. Purcell, 24 L. J. Ch. 523.

³ N. E. Trust Co. v. Pitkin, 163 Mass. 506, 40 N. E. R. 1044; Kinkele v. Wilson, 151 N. Y. 269, 45 N. E. R. 869; Bell v. Humphrey, 8 W. Va. 1, 19. A devise to trustees to pay certain sums, and afterwards “should they think proper so to do to pay over from time to time the net income,” does not confer power on the trustees to retain the net income because a comma has

punctuation is not material and may be omitted or supplied by the court.¹ Hence, where the testator has omitted all marks of punctuation, the court will punctuate the will for him, if by so doing his intention may the more readily be ascertained. And, on the other hand, if he has inserted the wrong marks, as where he has placed a comma where a period belongs, or *vice versa*, the court will, if possible, either correct his errors or disregard them, if by so doing his true meaning is more apparent and the will may thus be supported. And to enable the court to do this properly, it is relevant and usually very important, if not indispensable, to show the circumstances and situation of the testator and the condition of his property and family.²

§ 370. **Scandalous matter may be erased from will on probate.**—The statutory right to execute a will, and the requirement that its contents shall be set forth at length upon the records of the court, were not designed for the purpose of enabling persons of a spiteful and revengeful disposition to circulate and secure publicity for scandalous accusations against others, where the persons injured would no longer be in a position to secure redress. For this reason a probate court should, on motion of the person aggrieved, order scandalous matter to be erased from a will, where such matter is irrelevant, and particularly if the accusation is untrue.³ Thus, where a will, after disposing of testator's entire estate, recites that "whereas, one of my sons is deceased and there is a child in existence which is claimed to be his, now it is my will that no portion of my estate, real or personal, shall go or belong to him,"⁴ the court ordered this clause to be expunged from the record when it was proved that the child was legitimate.

been omitted after "so to do." Black v. Herring, 79 Md. 146, 28 Atl. R. 1063. See also Sandford v. Raikes, 1 Mer. 65; Gordon v. Gordon, L. R. 5 H. L. 276.

¹ Lycan v. Miller, 112 Mo. 548, 20 S. W. R. 36.

² Donohue v. Donohue, 54 Kan. 136, 37 Pac. R. 998.

³ In re Honywood, L. R. 2 P. & D. 25.

⁴ In re Bomar's Will, 18 N. Y. S. 214, 27 Abb. N. C. 425.

CHAPTER XVIII.

THE MARSHALING OF ASSETS AND THE ABATEMENT OF LEGACIES.

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| <p>§ 371. History of the rule that land was not assets at the common law.</p> <p>372. Language sufficient at common law to charge debts on land.</p> <p>373. Modern rule as to the order of the liability of assets for debts.</p> <p>374. Primary liability of personal property for debts.</p> <p>375. Language sufficient to exonerate personal property.</p> <p>376. The burden of proof to show that the personal property is exonerated from payment of debts.</p> <p>377. Charges of funeral and testamentary expenses on the land.</p> <p>378. Exoneration of personal property bequeathed specifically.</p> <p>379. Direction to sell land to pay debts does not convert out and out.</p> <p>380. Devise of land after payment of debts.</p> <p>381. Meaning of debts as charged upon real estate.</p> <p>382. Power of sale created by direction to pay debts out of land or issues of land.</p> <p>383. Parol evidence of insufficiency of personal property at the execution of the will.</p> <p>384. Exoneration of mortgaged land devised—The intention that the devisee shall take <i>cum onere</i>.</p> | <p>§ 385. Lands acquired subject to incumbrance not unburdened by the executor.</p> <p>386. Exoneration from mortgages of land taken in lieu of dower.</p> <p>387. The marshaling of assets in exoneration of mortgaged land.</p> <p>388. The statutory provisions construed.</p> <p>389. The wasting of the personal property does not cast debts upon the land.</p> <p>390. The abatement of general legacies.</p> <p>391. The abatement of annuities.</p> <p>392. Priority among general legatees.</p> <p>393. Exoneration of personal property specifically bequeathed.</p> <p>394. Liability of legatee of shares to calls.</p> <p>395. General legacies, when abated.</p> <p>396. Language necessary to charge a general legacy upon land specifically devised.</p> <p>397. Blending of real and personal property as showing an intention to charge legacies upon the land.</p> <p>398. A direction that a legatee shall pay a legacy constitutes it a charge.</p> <p>399. When a legacy is charged by a devise of land after the payment of the legacy.</p> <p>400. Whether provisions for the support of a legatee by a</p> |
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devisee are conditions or charges upon the land devised.	on land — When residence on land is required.
§ 401. The personal liability of the devisee.	§ 403. The lien of the charged legacy.
402. Support of legatee a charge	404. Extinguishment or merger of a charge.

§ 371. History of the rule that land was not assets at the common law.— The land of a decedent was not liable at common law, in the hands of his heirs or devisee, for debts which were not created by an instrument under seal. Creditors under contracts not sealed were confined exclusively to seek the satisfaction of their claims out of the personal estate of the deceased.¹ But it was always permissible for a man, by will, to direct that the specific or residuary devisee of his lands should take subject to the payment of his simple contract debts, either as a primary fund or *pari passu* with the personal assets. The common-law rule was so plainly contrary to the progress of industrial enterprise which set in in England at the end of the eighteenth century that strenuous efforts were made to enact a new rule. While commerce and manufactures were limited, and while the wealth of the nation consisted mainly of real property, the injustice of the rule, though great, was not so keenly felt. But when, because of the increase of commercial transactions arising out of the import, manufacture and export of commodities, and which were seldom, if ever, evidenced by sealed instruments, the rule of law which took the land of the deceased, in which he had probably invested the profits of his trade gained at the expense of his surviving creditors, out of their reach, demanded immediate reform. The first step in the direction of reform was statute 47 Geo. III., c. 44, which rendered liable to the claims of simple contract creditors the freehold estates of the deceased, where he was a merchant or a tradesman and subject to the insolvency laws. This act was inadequate to effect any real reform, as it included no private land-owners who were not merchants or traders. Subsequently, by statute 3 & 4 William IV., c. 104, it was provided that, where any person should die seized of or entitled to real property of any description whatever, it should be assets, to be administered in courts of equity in payment of his debts, whether

¹ Co. Lit. 209a; Shep. Touch. 309.

due on simple contracts or otherwise. It was also provided that the heir or devisee of the land should take the same subject to the debts of the ancestor or testator to the same extent as though he were bound by a charge in the will or by a specialty obligation; and though in this act creditors by specialty were preferred over simple contract creditors, subsequently, by 33 Vict., c. 366, this distinction ceased to exist.

§ 372. **Language sufficient at common law to charge debts on realty.**—The courts of equity, in their anxiety to protect the rights of those creditors who, at common law, were not able to subject the land of the testator to the satisfaction of their debts, endeavored to construe wills so as to charge the debts of the testator upon the real property. Where the testator directed in general terms *that all his debts should be paid*, the courts took it to mean that they should be *paid out of the real property*, in case he left personalty. The matter was regarded as one of intention. Equity presumed that a man intended to be just and to pay his debts, and slight indications of such an intention would create a charge upon his land by implication. If he did not by express language or necessary implication charge lands disposed of under the will, the devisees took them free from incumbrance. But it was said that the slightest mention of debts in a will would charge simple contract debts on the real estate; for why should the testator mention his debts, or their payment, at all, if he did not intend that they should be paid in any event?¹ If the testator, at a time when simple contract debts are not payable out of land, prefaces a devise of his estate with a statement or direction that “my debts shall be first paid, satisfied or deducted,”² or that all his debts and funeral expenses should be paid in the first place,³ the conclusion is irresistible that he desires that all his debts should be satisfied before his devisees take the land.⁴ And it seems to have been immaterial whether the testator said *first*, or *imprimis*, “I direct my debts to be paid,”

¹ Harris v. Douglas, 64 Ill. 466, 472; Kentish v. Kentish (1791), 3 Bro. C. Gaw v. Hoffman, 12 Gratt. (Va.) 628, C. 257.

633; Funk v. Eggleston, 92 Ill. 515.

²Newman v. Johnson (1682), 1 Vern. 45, 1 Eq. Cas. Abr. 197; Harris v. Ingledew (1730), 3 P. W. 91, 96.

³Trott v. Vernon, 2 Vern. 708, 709;

⁴Bowdler v. Smith, Pra. Ch. 264;

Trott v. Vernon, Finch, Pra. Ch. 430, 2 Vern. 708; Hatton v. Nichol, Cas. T. Talbot, 110.

or whether he has omitted these particular terms.¹ The words are merely a customary formal introduction, and have no particular meaning, for debts must necessarily be paid, if at all, before the title to the land shall vest in the devisee. So we may sum up the rule that a general direction to pay debts, irrespective of its form, made them payable out of the proceeds of the real property, at common law, where the personal assets proved insufficient. If, however, in the will in which the testator directed generally that his debts shall be paid, he provided a special fund in trust, of real property, for the payment of his simple contract debts, they will not constitute a charge upon the land devised in general terms.² Where the testator directs his executor to pay his debts, it will be presumed that he intended him to pay the debts out of the fund over which alone he has control—that is, the personal property,—and the land is not charged.³ And if the executor is also the general devisee of the land, taking it as an individual, it by no means follows, because the testator directs him to pay debts as an executor, that he intends them to be charged upon the land which he takes as an individual.⁴

§ 373. Modern rule as to the order of liability of assets for debts.—In consequence of the legislation mentioned in the preceding sections,⁵ a distinction was made between the various kinds of property owned by a decedent at his death, by which some of it was administered as assets in law, while other portions could only be reached in equity. Thus, for example, lands devised by the testator *in trust* for the payment of his debts were administered by a court of equity alone *by reason of its jurisdiction of trusts*. So, too, an equity of redemption, being an equitable and not a legal estate, could only be reached by a creditor through a bill in equity, and not by an execution at the common law.⁶ An equity of redemption is now by statute legal assets in the hands of the heir or devisee, both in England

¹ *Finch v. Hattersly*, cited 7 Vesey, 210, 3 Russ. 345, n.

² *Awbrey v. Middleton*, 2 Eq. Cas. Ab. 497.

³ *Thomas v. Britnell*, 2 Ves. 313; *Corser v. Cartwright*, L. R. 8 Ch. 971.

⁴ *Ante*, §§ 371, 372.

⁵ 2 Story, Eq. Jur., § 1247; *Brydes v. Landen*, 3 Russ. 346, cited 3 Ves. 550; *Powell v. Robbins*, 7 Ves. 209; *Keeling v. Brown*, 5 Ves. 359.

⁶ *Van Ness v. Hyatt*, 13 Pet. (38 U. S., 1839), 294; *Plunket v. Penson*, 2 Atk. 294; *Solley v. Gower*, 2 Vern. 61; 3 Black. Com. 418.

and in most of the states,¹ and generally the former distinction between legal and equitable assets is now universally abolished. At the present time the property of the testator is liable for the payment of his debts, whatever their character, in the following order: 1. The general personal estate, whether bequeathed or not, provided it is not expressly exempted. 2. Any estate or fund, real or personal, expressly charged with the debts. 3. Lands descended to the heir. 4. Real or personal property specifically devised, and which are charged with the payment of debts. 5. General pecuniary legacies, which abate *pro rata*. 6. Specific legacies. 7. Personal or real estate over which the testator has exercised a general power of appointment.

§ 374. **Primary liability of personal property for testator's debts.**— That the personal estate of the testator is the primary fund for the payment of debts is elementary and needs no illustration.² By modern statutes the real property of the testator is made secondarily liable for the payment of all debts in case of a deficiency of personalty. But these statutes do not abrogate the rule that a testator may, if he choose, wholly exonerate the personal property from debts and cast their payment upon his real property in the first instance.³

There can be no question of the power of the testator to exonerate his personal property from its primary liability and to cast the payment of debts upon his real estate comprised in a specific or general devise. The difficulty lies in determining what language shall be sufficient for this purpose. A mere general charge of the debts upon the real estate is not usually considered sufficient to exonerate the personal property, the primary fund, for the creditor now by statute has a right to resort to that species of property upon a deficiency of personal. The true rule is that the testator must not only charge the pay-

¹ *Roosevelt v. Fulton*, 7 Cow. (N. Y.) Estate, 20 Mich. (1870), 442, 451; *Slack* 71; *Ingersoll v. Sawyer*, 2 Pick. (19 v. Emery, 30 N. J. Eq. 458; *Hawley* Mass., 1823), 276. v. James, 5 Paige (N. Y.), 818, 449;

² *Woodworth's Estate*, 81 Cal. (1867), 595, 600; *McCullom v. Chidester*, 63 Ill. (1872), 477; *Quinby v. Frost*, 61 Me. 77, 81; *Chase v. Lockerman*, 11

Gill & J. (Md., 1840), 185; *Gore v. Brazier*, 3 Mass. 523, 536; *Wisner's* Estate, 20 Mich. (1870), 442, 451; *Slack* v. Emery, 30 N. J. Eq. 458; *Hawley* v. James, 5 Paige (N. Y.), 818, 449; *Johnson v. Farrell*, 64 N. C. (1870), 266; *Blake's Estate*, Appeal of Chilcott, 184 Pa. St. 240.

³ *Bergman v. Bogda*, 46 Ill. App. 351, 358.

ment of his debts upon his real property, but he must also expressly or by necessary implication direct that the real property shall be primarily liable and that the personal property shall be discharged.¹

§ 375. **Language sufficient to exonerate personal property.** The language must show an intention to exempt the personal property. The intention must clearly appear. An express direction by the testator that his lands, or a *particular portion of his personal property*, shall be a primary fund for the payment of his debts, is controlling and will exempt all or a particular portion of the personal property. Thus, a devise of land to A., *he paying* the debts of the testator, or a direction that lands in the residuary clause shall be sold to pay debts and the *residue added to the personal estate*,² or a direction that debts shall be paid out of the personalty so far as the real property *given for the purpose* shall prove insufficient,³ or that a particular piece of real estate shall be taken *subject to the debts*,⁴ or that it shall be the primary fund for the payment of the debts, will exonerate the personal property from its primary liability.⁵ The testator need not, in express language, declare his debts to be a charge upon his real estate, and that his personal property is to be exempt from their payment, for the

¹ Woodworth's Estate, 81 Cal. 595, 600; Hayes v. Sykes, 120 Ind. 180, 183, 21 N. E. R. 1080; Miller v. Harwell, 8 Murph. (N. C.) 194, 201; Mitchell v. Mitchell, 3 Md. Ch. 71, 78; Stevens v. Underhill (N. H.), 36 Atl. R. 370; Deering v. Kerfoot, 89 Va. 491, 494, 16 S. E. R. 671; Clinefelter v. Ayres, 16 Ill. 329, 332; Bishop v. O'Conner, 69 Ill. 431; Scott v. Morrison, 5 Ind. 551, 552. "I never heard, until the arguments in this case, that such a rule had been extracted from the authorities on the subject; on the contrary, I have always understood that, in order to exempt the personal estate, the testator must express an intention to do so, though no particular form of words is necessary for the purpose. I therefore take the rule to be that neither the charge of the debts upon the real estate nor

the gift of the personal estate is sufficient to exempt it. But it is indubitably true that express words are not necessary to exempt the personal estate. The question, therefore, is whether a presumption can be drawn of the testator's intention to exonerate the personal estate. It is impossible to express in definition what circumstances shall be sufficient to raise this presumption. It may arise from the context of the will." Lord Thurlow in Duke of Ancaster v. Mayer, 1 Bro. C. C. 454.

² Webb v. Jones, 2 Bro. C. C. 60, 1 Cox, 245.

³ Wills v. Bourne, L. R. 16 Eq. 487.

⁴ Hines v. Spruill, 2 D. & B. Eq. (N. C.) 101.

⁵ Young v. Young, 29 Beav. 522; Forrest v. Prescott, L. R. 10 Eq. 545.

intention may be gathered from all the context. Where the will is silent, a presumption will be recognized that the testator intends his debts to be paid out of property on which the law fixes the liability for them. But this presumption, if indeed it be such, will yield readily to a clear expression of a contrary intent. And if, upon the whole will, either by express language or from necessary implication arising from the nature of the legacies and all the circumstances, evidence of an intention to make the real property the primary fund appears that will convince a fair-minded man that it is intended to be the primary fund for the payment of the debts, to the total exoneration of the personal property, the latter will be released.¹

¹ Bell v. Hogan, 1 Stew. (Ala., 1828), 536; Lightfoot v. Lightfoot, 27 Ala. (1855), 351; Marsh v. Marsh, 10 B. Mon. (49 Ky.) 361; Broadwell v. Broadwell, 4 Met. (61 Ky., 1862), 290; Watkins v. Jenkins, 74 Iowa (1888), 749, 35 N. W. R. 639; Scott v. Morrison, 5 Ind. (1854), 551; Quinby v. Frost, 61 Me. 77, 82; Seaver v. Lewis, 14 Mass. (1817), 83; Brant's Will, 40 Mo. 266, 279; Provost v. Provost, 27 N. J. Eq. (1876), 296; Lytle v. Beveridge, 58 N. Y. (1874), 592; In re Bingham, 127 N. Y. 296, 27 N. E. R. 1055; Clift v. Moses, 116 N. Y. 144, 23 N. E. R. 598; Robards v. Northam, 2 Dev. Eq. (17 N. C.) 173; Bane v. Wick, 14 Ohio St. 505; Walker's Estate, 3 Rawle (Pa., 1832), 241; Everson's Appeal, 84 Pa. St. (1877), 178; Calder v. Curry, 17 R. I. 610, 24 Atl. R. 103; Bank v. Ballou, 16 R. I. (1888), 351; Parker v. Wasley, 9 Gratt. (Va., 1832), 477; Fenwick v. Chapman, 9 Peters (34 U. S., 1835), 461, 471; Newport v. Newport, 5 Wash. St. 114. "A testator may order his debts and the expenses of administration to be paid out of his personal or out of his real estate, or out of both, or out of any particular piece or parcel. When he makes no distinct provision as to the specific kind of property, the

general rule is understood to be that the debts shall be paid out of the personal estate. But this rule is subject to the well-established rule that the will of the testator must govern, and that this will, or intention, may be gathered from the provisions of the whole testament, and may be inferred from the nature of the legacies or devises and the manifest object and purpose of the testator, and from all the circumstances of the case." By Kent, J., for the court, in Quinby v. Frost, 61 Me. 77, 81. "In equity it is well established that the personal estate is the natural and primary fund for the payment of debts and legacies, even where they are expressly charged upon the real estate, descending or devised; and that the real estate is only to be resorted to as an auxiliary fund after the personalty is exhausted. For this unquestionable principle, if authority be necessary to support it, see 2 Johns. C. R. (N. Y.), where Chancellor Kent says the personal estate is the proper fund to pay debts and legacies, and, *in general*, it is first to be applied, though the real estate be charged." Remarks by Judge Stephen in Stevens v. Gregg, 10 Gill & J. (Md.) 143, 147.

§ 376. The burden of proof to show that the personal property is exonerated from payment of debts—Devise in trust for sale to pay debts.—The burden of proof to show that the testator meant to exonerate the personal property from its primary liability for his debts is upon the party alleging its existence. A mere direction to the executor to pay all debts,¹ or to pay all debts out of the estate,² or out of the first realized assets of the estate,³ is not enough *alone to exonerate the personal property* from its primary liability, although the real estate is also expressly given to the executor.

The creation of a *trust to sell lands for debts, or the devise of the legal title to A., subject to a power of sale in the executor to sell the lands for the payment of the debts* of the testator, does not in modern times exonerate the personal property or even compel a proportionate contribution from the real property. It must appear that a deficiency of personal assets exists before the power of sale can be validly executed.⁴ It is considered that the power of sale was given only to avoid a long and expensive proceeding which the creditors would have to institute under the statute if the personal estate should prove insufficient to pay debts.

But a contrary rule is observed in some cases, where the land is devised *expressly to the executor, and he is also given a power of sale to pay debts*, or where land is given him and he is directed to pay debts out of the estate, when a power of sale will be implied.⁵ The express devise of real property to the executor which he *would not otherwise take* shows that the testator intended to exonerate the personal property which the

¹ Harmon v. Smith, 38 Fed. R. 482; N. Y. 361; Heermans v. Robertson, 64 N. Y. (1876). 332; Sweeney v. Warren, 127 N. Y. 426, 28 N. E. R. 412. In this case the personal property was undisposed of by the will. Cunningham v. Parker, 146 N. Y. 29, 40 N. E. R. 635; Robards v. Worthen, 2 Dev. Eq. (N. C.) 173, 177; Tait v. Northwick, 4 Ves. 816; Tower v. Lord Rouse, 18 Ves. 132, 138; Lord Inchi-quin v. French, 1 Cox, 1; Rhodes v. Rudge, 1 Sim. 79. See *post*, § 382.

² Clift v. Moses, 116 N. Y. 144, 22 N. E. R. 393; Quinby v. Frost, 61 Me. 77, 81; Gaw v. Hoffman, 12 Gratt. (Va.) 628; McGlaughlin v. McGlaughlin, 43 W. Va. 226, 239, 27 S. E. R. 378.

³ Ames v. Holderbaum, 44 Fed. R. 224.

⁴ Hayes v. Sykes, 120 Ind. (1889), 180; Chapin v. Waters, 116 Mass. (1875), 146; Clift v. Moses, 116 N. Y. (1889), 144, 154; In re Powers, 124

⁵ *Post*, § 382.

executor *does take* under the law without an express gift, and the proceeds of the sale of the land will contribute *pro rata* with the personal property to the payment of the debts.¹

§ 377. **Charges of funeral and testamentary expenses on the land.**—The direction of the testator that his funeral and testamentary expenses, and other charges which relate *exclusively to the administration of the personal estate*, and which would ordinarily be paid out of that fund, shall, with *his debts*, be a charge upon his land, with a devise in trust for its sale, has been under consideration in the English cases, and is by some of them given great weight as an indication of an intention wholly to exonerate the personal property from its primary liability for debts.² This circumstance alone is never conclusive, and in many cases has been given no weight as showing an intention to exonerate the personal property.³ Though a devise of real property in trust for sale to pay debts generally does not show a conclusive intention to exonerate the personal property, a direction that *a particular debt shall be paid out of a particular piece of real property* may indicate an intention wholly to exonerate the personal estate as to *that* debt. The debt is already payable secondarily out of all the real property; and the plain intention of the testator was, in directing a particular part of his land to be sold and the debt paid out of the proceeds, not only to relieve the residue of his real property, but all his personalty. To hold that the personal property is still the primary fund would be to reject the directions of the testator.⁴ So, if the debt is already a lien upon the particular piece of property devised in trust for its payment, or if the whole landed estate is devised for its pay-

¹ *In re Tanqueray*, L. R. 20 Ch. D. 465, 476; *Henvell v. Whittaker*, 3 Russ. 348; *Kilford v. Blaney*, L. R. 31 Ch. D. 56; *Ashworth v. Munn*, L. R. 34 Ch. D. 391; *In re Bailey*, L. R. 12 Ch. D. 268; *Finch v. Battersbey*, 3 Russ. 345; *Hartland v. Murrell*, 27 Beav. 204; *Bergman v. Bogda*, 46 Ill. App. 351, 358; *Lewis v. Darling*, 16 How. (U. S.) 1, 8.

² *Bootle v. Blundell*, 1 Mer. 193, 229, 238; *Tower v. Lord Rouse*, 18 Ves. 139; *Plenty v. West*, 16 Beav. 176.

³ *McClelland v. Shaw*, 2 Sch. & Lef. 538; *Hartley v. Hurle*, 5 Ves. 540; *Walker v. Jackson*, 2 Atk. 624; *Brydges v. Phillips*, 6 Ves. 570; *Gray v. Minnethorpe*, 3 Ves. 103.

⁴ *Hancox v. Abbey*, 11 Ves. 179, 13 Price, 218, 319, 321; *Welby v. Rockcliffe*, 1 R. & Mt. 571; *Evans v. Cockeram*, 1 Coll. 428; *Bateman v. Roden*, 1 Jo. & Lat. 356. *Contra*, *Noel v. Lord Henley*, 7 Price, 241.

ment, the personal property, which is under the law equally liable, will be wholly exempt.¹

§ 378. **Exoneration of personal property bequeathed specifically.**—It is now firmly established that a devise of lands to A. in trust, *he not being the executor*, to sell for the payment of debts, with the bequest of the residue of the personal property to B. *as a residue*, does not render the land liable primarily. Neither will the charge of funeral expenses or of testamentary expenses, in addition, upon the land, have that effect.² On the other hand, the intention to give the personal property *specifically or as a quasi-specific legacy*, which is shown where it is spoken of and described, not as a residue or as all the residue of the personal property, but as "*all my personal property*," or as "*all my money, chattels, rights and personal property whatsoever*," or by some similar phrase occurring in a will which *also creates a trust in land for the payment of debts and other expenses* which are usually paid out of the personal estate, is a circumstance pointing strongly to an intention to wholly exonerate the personal estate. The distinction is between a gift of *a residue as a residue*, and a bequest of personal property *specifically enumerated, coupled with a gift of "all the personal property," or of "all the residue of the personal property."* The testator, in bequeathing a residue of his personal property, means as much of it as remains after deducting those charges, *i. e.*, debts and money legacies, which are placed thereon by the rules of the law, and that is all he means the legatee to take. He will not be presumed to intend that he shall take this clear of debts. But when he gives a legatee articles or some species of personalty specifically described, and all personal property not hereinbefore disposed of, and has also devised land in trust for the payment of debts, he may, with good reason, be presumed to intend that the legatee shall take the articles exonerated from their primary liability for debts.³ This distinction, too, is favored by the fact that not only debts, but *all expenses*, as for the funeral and administration,⁴ and

¹ *Hancox v. Abbey*, 11 Ves. 179;
Evans v. Cockeram, 1 Coll. 428.

² *Aldridge v. Lord Wallscourt*, 1 Ba. & Be. 312; *Brummell v. Protheroe*, 3 Ves. 111.

³ See cases in next note.

⁴ *Blount v. Hipkins*, 7 Sim. 43;
Bootle v. Blundell, 1 Mer. 193, 228;
Greene v. Greene, 4 Mad. 198; *Jones v. Bruce*, 11 Sim. 221; *Mitchell v.*

a fortiori, if legacies also are to be included,¹ which ordinarily would be paid out of the personal estate, are expressly thrown upon the land. And while some of the cases seem to regard the fact that the legatee of all the personal property, with or without an enumeration of particulars, is also appointed the executor as a very material circumstance to show that, by the creation of the trust estate in the land to pay debts, the testator intended to exonerate the personal property, others repudiate this circumstance and apply the rule to cases where the general or residuary legatee is not appointed an executor.²

The testator may charge all his debts upon a particular portion of his personal property to the exoneration of the balance, and this he may legally do though he shall not dispose of the balance in the will specifically,³ though he must dispose of it by his will, as the property will not be exempt for the benefit of the next of kin.⁴ The fund thus charged is *primarily liable* for debts, and not until it is *completely exhausted* can the creditors resort to the balance of the personalty.⁵ But this discrimination which results from the testator making a *portion* only of his personalty the primary fund for the payment of debts does not wholly exempt the balance in case of a deficiency of the primary fund to the prejudice of his creditors. The testator will not thus be permitted to contravene the long-established rule which makes the whole personal estate the primary fund for the payment of debts, and to exonerate the real estate by vague language. To reason that, because he has expressly directed that *only a portion of the personal property* shall bear *all* the debts, the balance shall in every contingency be exempt from a liability for any, is mere conjecture and contrary to all recognized rules of construction.⁶ The payment of debts is not cast upon the personal property as the primary

Mitchell, 5 Mad. 69; Lance v. Aglionby, 27 Beav. 65; Gilbertson v. Gilbertson, 34 Beav. 354.

¹ Coote v. Coote, 3 Jo. & Lat. 175; Lance v. Aglionby, 27 Beav. 65.

² Collis v. Robins, 1 De Gex & Sm. 131; Ousely v. Anstruther, 10 Beav. 453.

³ Holford v. Wood, 4 Ves. 78; Hewett v. Snare, 1 De Gex & Sm. 333.

⁴ Coventry v. Coventry, 2 Drew. & Sm. 470.

⁵ Browne v. Groombridge, 4 Mad. 495; Webb v. De Beauvoisin, 31 Beav. 573; Evans v. Evans, 17 Sim. 106;

Choat v. Yeates, 1 Jo. & Lat. 102; Coventry v. Coventry, 2 Drew. & Sm. 470.

⁶ Lord Brooke v. Warwick, 2 De Gex & Sm. 425, 1 H. & T. 142.

fund by an express direction that certain charges shall be paid out of it, to which, in the absence of such a direction, it is by law liable. So an express direction that legacies or testamentary or funeral expenses are to be paid by the executor, with a devise of the real estate in trust to sell for the payment of the debts, does not, by implication, charge other items not mentioned, and for which the same fund is by law liable, on the proceeds of the real property.¹

§ 379. Direction to sell land to pay debts does not convert out and out.—An imperative direction to sell land which is devised to the executor for the payment of debts *does not effect an out and out conversion*, so that the surplus proceeds of the sale, *after the payment of the debts*, are a part of the personal estate out of which general legacies must be paid. The surplus goes to the devisee of the land or to the heir, as the case may be.² Nor will a devise in trust with an imperative power of sale for a particular purpose, though it shall perhaps result in a constructive conversion, render the land personalty, nor even the actual proceeds of sale personal property which may be marshaled with the personal property for the payment of debts, at least when the personal estate of the testator was originally sufficient for that purpose.³

§ 380. Devise of land after payment of debts.—A devise of land to A., “my debts being first paid,”⁴ or “subject to the payment of my debts,”⁵ or “on condition that the devisee shall pay my debts,”⁶ or “after the payment” of debts,⁷ though no personal liability exists, unless the devisee expressly promises to pay the debts,⁸ may so charge the debts upon the real

¹ *Watson v. Brickwood*, 9 Ves. 447. See *Bootle v. Blundell*, 1 Mer. 193, 230; *Brydges v. Phillips*, 6 Ves. 570.

² *Golder v. Chandler*, 87 Me. 63, 70, 32 Atl. R. 784.

³ *Johnson v. Conover* (N. J.), 35 Atl. R. 291; *Jackson v. Jackson*, 6 Johns. 73; *Hawley v. James*, 7 Paige, 213; *White v. Howard*, 46 N. Y. 144; *Clift v. Moses*, 116 N. Y. 144, 154; *Fisher v. Banta*, 66 N. Y. 468; *In re McComb*, 117 N. Y. 378, 22 N. E. R. 1070; *North v. Valk*, *Dud. Eq.* (S. C.) 212, 217.

⁴ *Bell v. Raymond*, 20 Conn. (1850),

338; *Alexander v. McMurry*, 8 Watts (Pa., 1839), 504.

⁵ *Smith v. Wyckoff*, 11 Paige (N. Y.), 49.

⁶ *McFait's Appeal*, 8 Pa. St. (1848), 290.

⁷ *Darlington v. Borland*, 3 Stew. (Ala., 1830), 9; *McClellan v. Turner*, 15 Me. (3 Shep., 1839), 436; *Jackson v. Bull*, 10 Johns. (N. Y., 1813), 148; *Denn v. Moore*, 2 Bos. & Pul. 247; *Doe v. Clarke*, 5 Bos. & P. 343.

⁸ *Bishop v. Howarth*, 59 Conn. 455, 465.

estate as to wholly exonerate the personal property from their payment. But a gift of land *after the payment of the debts*, either preceding or following a residuary gift of a blended fund of real and personal estate, does *not make* the debts a charge upon the land *alone* to the *complete* exoneration of the personal property. Such a clause only subjects all the property thus given to the payment of debts, and each species of property bears its proportion thereof.¹

§ 381. Meaning of "debts" as charged upon real estate. The word "debt" primarily means a sum of money due upon a contract. In its more general sense it signifies any liability or obligation which one person is obliged to pay to or perform for another, or for his benefit, which is due from one person to another, either in money, goods or services.² Ordinarily the word "debts" does not include any liabilities of the estate created *after* the death of the testator, unless they arise out of some contract or transaction by which he was bound at the date of his death.³ Where the testator, having failed in business and compromised with his creditors, directed that they should be paid in full, interest on the debts was directed to be paid;⁴ but usually a devise in trust to pay debts does not cause simple contract debts,⁵ whether of the testator or of another person,⁶ to carry interest. A charge of debts upon land does not *per se* revive those barred by statute,⁷ unless there is a direction inserted to deduct from the share of one legatee the "debts" he owes another, with the object of an equal division.⁸ Whether a discretion to pay another's debts given by the testator to the executor will permit him to pay debts contracted after the death of the former depends upon the express terms of the will.⁹

¹ Decker v. Decker, 121 Ill. (1887), 341, 12 N. E. R. 750; Hamilton v. Smith, 110 N. Y. (1888), 159, 17 N. E. R. 740; Smith v. Coup, 6 Dem. Sur. 45. Morse v. Tucker, 5 Hare, 79; Eardley v. Owen, 10 Beav. 572.

² Cook v. Bartholomew, 22 Atl. R. 444 (1891), 66 Conn. 24; McKeesport v. Fidler (Pa. St.), 23 Atl. R. 799; Barber v. City of East Dallas, 18 S. W. R. 488.

³ In re Harrison, L. R. 43 Ch. D. 55; Lomas v. Wright, 2 My. & K. 769;

⁴ Sinclair's Appeal, 116 Pa. St. 516, 9 Atl. R. 637.

⁵ Lloyd v. Williams, 2 Atk. 110; Barwell v. Parker, 2 Ves. 363.

⁶ Askew v. Thompson, 4 K. & J. 620.

⁷ Burke v. Jones, 2 Ves. & B. 275.

⁸ Poole v. Poole, L. R. 7 Ch. 17.

⁹ Joel v. Mills, 7 Jur. (N. S.) 389.

§ 382. **Power of sale created by direction to pay debts out of land or issues of land.**—Where the testator directs the payment of his debts *simpliciter*, or out of his estate, and devises all his real property to his executors or to trustees, without expressly creating a power of sale, it will often be implied where the personal property is insufficient to pay the debts.¹ Whether a direction to raise money out of the “*rents and profits*” or “*the proceeds of land*” for the payment of debts shall, by implication, create a power to mortgage or sell the land itself, has been much litigated. The question is, Does the testator, by the words *rents and profits*, *income* or *proceeds*, refer to the annual produce of the land, or does he mean the actual result in money which will be produced by a sale of the land. If he means the latter, a power of sale must be implied. A direction that debts or legacies shall be paid out of the *annual* issues and profits conclusively shows that a sale is not intended.² If, however, the will is silent as to a sale, but directs that debts or legacies shall be paid within a fixed period, and it clearly appears that a sufficient sum for that purpose will not accumulate from the annual income within the period, a power of sale will be implied.³ And later cases in England went further than this, holding that, if a definite sum was devised out of the profits of land to pay debts or legacies, and the profits would not, *within a convenient time*, accumulate enough to meet it, a power of sale would be implied.⁴

¹ In re Gantert, 32 N. E. R. 551 (1893), 136 N. Y. 106; O’Flynn v. Powers, 21 N. Y. S. 905; In re Powers, 26 N. E. R. 940 (1890), 124 N. Y. 361; Cahill v. Russell, 140 N. Y. 402, 35 N. E. R. 664. A power of sale to pay debts does not authorize a sale for *any* other purpose. Brome v. Pembroke, 66 Md. 198, 7 Atl. R. 47; Griffin v. Griffin, 141 Ill. 373, 81 N. E. R. 131. The power may be exercised though the debt is due the executor. O’Flynn v. Powers, 136 N. Y. 412.

² Marsh v. Marsh, 2 Jurist (N. S.), 348; Forbes v. Richardson, 11 Hare, 354.

³ Sheldon v. Dormer, 2 Vern. 310;

Warburton v. Warburton, 2 id. 420; Jackson v. Farrand, 2 id. 424.

⁴ Heycock v. Heycock, 1 Vern. 256; Sheldon v. Dormer, 2 Vern. 310, 311. In Green v. Belcher, 1 Atk. 505, Lord Hardwicke said: “Here money is directed to be raised by rents and profits; *unless there are other words to restrain the meaning, and to confine them to the receipt of the rents and profits as they accrue*, the court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell; and as a devise of the rents and profits will, at law,

One fact which is almost conclusive that by a direction to pay out of rents and profits the testator means yearly income is that the testator gives the *corpus* of the fund to be enjoyed *after the charges are satisfied*. So, too, if the testator directs that the rents and profits shall accumulate for the payment of legacies, and that when all are paid, but not before, the land shall be delivered over to devisees, no power of sale will be implied. Where *some* of the purposes to which the rents and profits are devoted may most conveniently be carried out by a sale, and, *a fortiori*, where a sale is indispensable or may be compelled, and other purposes may be effectuated without a sale, a power of sale will be implied only as to the former purposes. This is the case where there is a direction to pay debts and legacies out of rents and profits, and the will is otherwise silent. So far as the power to sell for payment of debts is concerned its implication is not material, for the creditors have now a statutory remedy by which, on deficiency of personal property, they may compel a sale. And this right, together with the improbability of an intention on the part of the testator that the payment of his debts should be delayed, furnishes an indication that a sale of the land was intended, which is not present where the payment of legacies or annuities, which are mere bounty, is directed out of rents.¹ A direction to pay out of rents and profits, *or* by the sale or mortgage of the land, is an alternative disposition, and the executor or trustee has no power to sell, *unless he is unable to pay out of the annual income*. An annual charge should always be paid out of rents and profits, while if it is a legacy in gross greatly exceeding the annual income, it may from the necessity of the case, in the absence of contrary intention, be absolutely necessary to make a sale.²

pass the lands, the raising by rents and profits is the same as raising by sale." The language of Lord Thurlow in *Shrewsbury v. Shrewsbury*, 1 Ves. Jr. 234, and of Lord Eldon in *Bootle v. Blundell*, 1 Mer. 193, is to the same effect. It would thus appear that where the will is silent it will be conclusively presumed that a sale was intended where a gross

sum is to be raised out of the rents and profits. This *prima facie* presumption may be removed by indications of a contrary intention, however slight, as pointed out in the text.

¹ See remarks of Jessel, M. R., *Metcalf v. Hutchinson*, 1 Ch. D. 591.

² *Playters v. Abbott*, 2 My. & K. 97.

§ 383. **Parol evidence of insufficiency of personal property at the execution of the will.**— In New York and other states the courts refuse to recognize a presumption of an intention that legacies shall be paid out of real estate from a blending of real and personal property in a residuary clause *alone, with nothing more*. In the first place, a legacy is never a charge on land included in a residuary clause *until the personal residuum is exhausted*. So, in order that a deficiency in the personal estate shall, in connection with the blending of real and personal property, create a presumption that legacies are to be paid out of real property, it is held that it must be shown that the deficiency existed *at the time the will was executed*, that the testator actually knew of it, or otherwise that it was so great and obvious as to preclude a possible inference that he was ignorant of it. To show these facts, parol evidence of the condition and circumstances surrounding the testator at the date of execution is admissible.¹

If it shall appear that, at the execution of a will in which he gives general pecuniary legacies, the testator owned real estate, but had *not sufficient personal property to satisfy the legacies*, it will be presumed that he actually intended, by the blending of his real and personal property, to charge the legacies upon the former equally with the latter.²

This reasoning is applicable as between general legacies *and land specifically devised*. If there be no express charge, the general legacy will not be a charge upon the land, unless there shall be proven facts which will raise a charge by inevitable implication. Such fact may be the non-existence, at the date of the will, of any personal property out of which the legacy can be paid. If this is the existing condition of affairs, giving

¹ *Black v. Richards*, 95 Ind. 184, 189; 530, 22 Atl. R. 530; *In re Pettit*, 6 Pocock v. Redinger, 108 Ind. 573, 575; Dem. Sur. 391; *Lupton v. Lupton*, 2 Cady v. Cady, 67 Miss. 425, 432; Van Johns. Ch. (N. Y., 1817), 614; *Brill v. Winkle v. Van Houten*, 3 N. J. Eq. Wright, 112 N. Y. 129, 134; *Hoyt v. Hoyt*, 85 N. Y. (1881), 142, 150; *Scott v. Stebbins*, 91 N. Y. 605, 612; *Wiltie v. Shaw*, 100 N. Y. 191, 195; *McCorn v. McCorn*, 100 N. Y. 511; *In re Rochester*, 110 N. Y. 159, 167; *Briggs v. Carroll*, 117 N. Y. 288, 291; *Hassenclever v. Tucker*, 2 Binn. (Pa.) 525.

² *Turner v. Gibb*, 48 N. J. Eq. 526,

a legacy would be a mockery upon the legatee, if, as may easily happen, the testator should die immediately after execution.¹

Again, if a testator has sufficient personal property when he makes his will, which he *subsequently* invests in real estate, and at his death has no personalty, it may be conclusively presumed that he intended that the legacies should be paid out of the real property, for that represents the money which he gave in his will.² But elsewhere parol evidence that the testator, who has left legacies, owned no personal property at the date of the execution of the will has been rejected when offered for the purpose of showing that he intended they should be charged upon his real estate.³

The intention that debts shall be paid out of the real property to the complete exoneration of the personal property cannot, according to the English cases, be shown by parol evidence, whether of declarations or of the testator's surrounding circumstances; as, for example, the relative amounts of the debts and of the personal estate at the date of execution.⁴ Nor can the fact be shown that, after contracting debts by which the personal estate was increased, the testator purchased land with the money and continued to own the land until his death.⁵

¹ *Duncan v. Wallace*, 114 Ind. (1887), 169, 171, 16 N. E. R. 187; *Davidson v. Coon*, 125 Ind. 497, 499; *Hoyt v. Hoyt*, 85 N. Y. 142; *McCorn v. McCorn*, 100 N. Y. 511; *Hedger's Estate*, 1 Con. Sur. 524, 6 N. Y. S. 769; *Lypit v. Carter*, 1 Ves. 499; *Cross v. Kennington*, 9 Beav. 150; *Elliot v. Hancock*, 2 Vern. 142.

² *Morris v. Sickley*, 57 Hun, 563 (1890), 11 N. Y. Supp. 456; *Turner v. Gibb*, 48 N. J. Eq. (1892), 526, 531, 22 Atl. R. 580; *Vanderhoff v. Lane*, 63 Hun (1890), 193, 17 N. Y. Supp. 712; *Briggs v. Carroll*, 117 N. Y. 288, 291. The fact that the total of all legacies given in the will *greatly* exceeds the amount of the personal property left by the testator may always be considered in determining whether the testator intended that they should be a charge upon the real estate comprised in a residuary clause. *Price*

v. Price, 52 N. J. Eq. 326, 29 Atl. R. 679; *Bragaw v. Bolles*, 51 N. J. Eq. 84, 25 Atl. R. 947.

³ *McGough v. Hughes*, 18 R. L. 768 (1898), 30 Atl. R. 851; *Wentworth v. Read* (Ill., 1898), 46 N. E. R. 777.

⁴ *Stephenson v. Heathcote*, 1 Eden, 38, Cro. Eliz. 205.

⁵ "The intention of the testator must be discovered from the words of the will itself, and not from extrinsic circumstances. We are not to inquire into the amount of the personal estate to know whether it be or be not sufficient to pay the testator's debts, because that would be to establish a general rule; that is, in every case where the personal estate is insufficient, it must be presumed to be the testator's intention to charge his real estate with all his debts. Besides, the personal estate is vague and uncertain and subject to great

§ 384. **Exoneration of mortgaged land devised — The intention that the devisee shall take cum onere.**— The general rule is (in the absence of statute¹) that land specifically devised which is subject to a *mortgage* or other incumbrance is to be exonerated out of the personal property of the testator. In order that this rule shall apply, it is necessary to show that the testator was *personally liable for the payment of the mortgage debt*, though it is not material whether the mortgage was executed *before* or *after* the execution of the will.² This rule, as is elsewhere explained,³ is applicable to a vendor's lien for unpaid purchase-money, which, where the land is specifically devised, must be paid by the executor out of the personal estate.⁴ This rule does not prevent the testator from requiring that a specific devisee shall take *cum onere*. The difficulty here lies in determining what language sufficiently expresses this intention. The inclination of the courts is to exonerate the land devised, and this will be done unless a contrary intent is very clearly expressed. A mere devise of land, *subject to a mortgage*, or to any other incumbrance, does not *per se* exonerate the personal property⁵ from its primary liability, for these terms are merely a description of the real property given.⁶ Even where real property was expressly devised to pay off a specific mortgage and other mortgages of the testator, the court held that such a devise in trust was not sufficient to relieve the per-

fluctuations. Few men know what their personal estate is." *Stephenson v. Heathcote*, 4 Eden, 38, 43; *An-caster v. Mayer*, 1 Bro. C. C. 466; *Brummel v. Protheroe*, 3 Ves. 111; *Aldridge v. Wallscourt*, 1 Ball. & B. 315; *Bootle v. Blundell*, 1 Mer. 193; *Parker v. Fearnley*, 2 Sim. & Stu. 592.

¹ § 388.

² *Woodworth's Estate*, 31 Cal. (1867), 595; *Plimpton v. Fuller*, 11 Allen (93 Mass.), 139; *Wilcox v. Wilcox*, 13 Allen (95 Mass.), 252; *Andrews v. Bishop*, 5 Allen (87 Mass.), 490; *Richardson v. Hall*, 124 Mass. (1878), 228, 236; *Slack v. Emery*, 30 N. J. Eq. (1878), 458; *Keene v. Munn*, 16 N. J. Eq. (1863), 498; *Risk's Appeal*, 1 Atl. R. 85, 110 Pa. St. 171; *Elliott v. Carter*,

9 Gratt. (Va.) 541, 549; *Patton v. Page*, 4 Hen. & M. (Va.) 449; 3 Greenl. Cruise, tit. 15, ch. 4, §§ 1-27.

³ §§ 708, 709.

⁴ *Riegelmann's Estate*, 174 Pa. St. 476, 34 Atl. R. 120; *McCracken's Appeal*, 39 Pa. St. 426; *Younge v. Furze*, 20 Beav. 380, 383.

⁵ *Hoff's Estate*, 24 Pa. St. 200, 205.

⁶ *Serle v. St. Eloy*, 2 P. W. 386; *Astley v. Tankerville*, 1 Cox C. 82, 3 B. C. C. 545; *Bickham v. Crutwell*, 3 My. & Cr. 763; *Newhouse v. Smith*, 2 Sm. & G. 344; *Milnes v. Slater*, 8 Ves. 306; *Bootle v. Blundell*, 1 Mer. 193; *Barnewall v. Cawdor*, 3 Mad. 453, 459; *Townshend v. Mostyn*, 26 Beav. 72, 76; *Morris v. Higbie*, 53 N. J. Eq. 173, 32 Atl. R. 372.

sonal property from its primary liability; that the devisees of the residue of this fund were entitled first to have the personalty applied.¹

§ 385. **Lands acquired subject to incumbrance not unburdened by executor.**—The rule that a devisee of land which is incumbered at the death of the testator may call for exoneration out of the personal residuum does not apply to a devise of land which was acquired by the testator subject to the incumbrance, whether the testator had acquired his title by purchase, or descent, or devise, provided he has done nothing clearly showing an intention that the mortgage debt shall be his own.²

The cases are divided as to what acts upon the part of the testator shall be sufficient to show that he meant to make the debt his own. The execution of a bond or other obligation to the mortgagee by the vendee will not *alone* be enough to exonerate the land, for, the debt not being the *original debt of the testator and vendee*, the covenant to pay is a collateral undertaking, to which the mortgagee may resort only upon the default of the principal debtor.³ But where the deceased, on purchasing the land, borrowed a further sum from the mortgagee, and gave him a new obligation for the whole,⁴ or where

¹ Wythe v. Henniker, 3 My. & K. 635; Hale v. St. Paul, 54 Minn. 421. It would seem that a devise of a mortgaged estate to A., he paying the mortgage thereon, would sufficiently relieve the personal property. This has been held, Lockhart v. Hardy, 9 Beav. 379; Hancox v. Abbey, 11 Ves. 179; and denied, Mead v. Hide, 2 Vern. 120; Bridgman v. Dove, 3 Atk. 201.

² Hewes v. Dehon, 3 Gray (Mass.), 205; Andrews v. Bishop, 5 Allen (Mass.), 490, 493; Creese v. Willis, 159 Mass. 249, 251; Cope v. Cope, 2 Salk. 449; Parsons v. Freeman, Amb. 115; Lacam v. Mertins, 1 Ves. 312; Perkins v. Bayntun, 2 P. W. 664.

³ Keysey's Case, 9 S. & R. (Pa., 1823), 71, 73; Mitchell v. Mitchell, 3 Md. Ch. 73; Cumberland v. Codrington, 3 Johns. Ch. (N. Y., 1817), 229, 257; M'Learn v. M'Lellan, 10 Peters (35

U. S., 1836), 625, 644; McLenahan v. McLenahan, 21 N. J. Eq. 101; Mount v. Van Ness, 33 N. J. Eq. 262; Gould v. Winthrop, 5 R. I. (1853), 319, 322; Tweddell v. Tweddell, 2 Bro. C. C. 101, 152; Bagot v. Oughton (1717), 1 P. W. 347; Evelyn v. Evelyn, 2 P. W. 650, 664; Leman v. Newnham, 1 Ves. 51; Scott v. Beecher, 5 Madd. 96; Ilchester v. Carnarvon, 1 Beav. 209; Swainson v. Swainson, 6 De G., M. & G. 648. An agreement by the purchaser of a mortgaged estate to pay a higher rate of interest (Shafto v. Shafto, 1 Cox, 207; Hoff's Estate, 24 Pa. St. 200, 204), or a new mortgage executed to secure arrears of interest, will not throw the payment of the debt upon the personal estate. Duke of Ancaster v. Mayer, 1 Bro. C. C. 454; Woods v. Huntington, 3 Ves. 128.

⁴ Woods v. Huntingford, 3 Ves. 128.

he entered into a covenant with the mortgagee to pay the debt,¹ he will be regarded as adopting the debt as his own, and his personal estate will be primarily liable.²

If the vendee of mortgaged land covenants with the vendor that he will purchase all the latter's interest in the land, and the sum which is due on the mortgage forms a part of the purchase price of the land, and the vendee retains out of what he would pay, a sum equivalent to what is due on the mortgage, expressly covenanting with the vendor that he will pay that amount to the mortgagee as a part of the consideration for the land, the vendee will be conclusively presumed to have adopted the debt as his personal debt. It is by no means material that the mortgagee is not a party to the transaction, so that he cannot maintain an action at law in covenant against the purchaser, for he can maintain an action, even at common law, for money had and received by the vendee, and in equity he will be subrogated to the vendor's rights as against the vendee.³ If the testator shall pay off the original mortgage and give a new one in his own name, he is then primarily liable and the land will be exonerated, though the money borrowed did not go to increase the personalty, but was devoted to paying off the original mortgage.⁴

§ 386. Exoneration from mortgages of land taken in lieu of dower.—The widow who accepts real property in lieu of her dower has the same right to call for its exoneration out of the personal estate from a mortgage or other incumbrance

¹ *Parsons v. Freeman*, Amb. 115, 2 Cox, 664.

² Where the devisee conveys the equity of redemption, assuming a personal liability for the mortgage debt, and subsequently, the mortgage being foreclosed, a deficiency judgment is rendered against him, he cannot, where the mortgagor is bankrupt, and his devisor was not personally liable, resort to the personal estate of the devisor for exoneration. *Goodburn v. Stevens*, 1 Md. Ch. 42; *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614; *Haven v. Foster*, 9 Pick. (Mass.) 112.

³ *Hoff's Estate*, 24 Pa. St. 200, 205;

Cope v. Cope, 2 Salk. 449; *King v. King*, 3 P. W. 360; *Pochley v. Pochley*, 1 Vern. 36; *Billinghurst v. Walker*, 2 Bro. C. C. 608; *Earl of Belvidere v. Rochfort*, 5 B. P. C. Toml. 299. But compare *contra*, *Barry v. Harding*, 1 Jo. & Lat. 475, by Sir Edward Sugden; *Woods v. Huntingford*, 3 Ves. 181, by Lord Alvanley. See remarks of Lord Thurlow in *Tweddell v. Tweddell*, 2 Bro. C. C. 101, 107, and *Galton v. Hancock*, 3 Atk. 436.

⁴ *Barham v. Earl of Thanet*, 3 M. & K. 607; *Gould v. Winthrop*, 5 R. I. 319, 323. See also *Townshend v. Mostyn*, 26 Beav. 72.

upon it to which she was not a party as other devisees. But where the rule of law is changed by statute, so that the devisee of mortgaged land takes it *cum onere*, unless a contrary intent expressly appears, the widow cannot claim to have it exonerated, unless the testator has expressly directed that the mortgage debt shall be paid by the executor. A mere direction to pay debts is not sufficient for this purpose.¹

The question is different in the case of a widow's claim of dower in mortgaged lands, where she has joined in the execution of the mortgage. The widow is entitled to dower in the equity of redemption as against the heir or the specific devisee, and every one else except the mortgagee or his assignee. Whether she has the right to call for the payment of the debt out of the personal estate, where she joined in the execution of the mortgage, the cases differ. Primarily the personalty of the husband is responsible for the payment of the debt, though the mortgagee may have exercised his option to foreclose the mortgage. Many cases hold that a widow, though she joined in the mortgage, may require the personal representative of her deceased husband to pay the mortgage debt in preference over other creditors, and, *a fortiori*, as against the residuary legatee; and the reason of this is that the bond is the principal evidence of debt, and the mortgage only collateral to it, being, so far as the widow is concerned, in the nature of a security for the payment of the debt. The testator is personally liable, and his liability devolves upon his representative, and should be met out of the property which was augmented by the money he received from the mortgagee.²

The reasoning of these cases has not met with universal ac-

¹ *Meyer v. Cahen*, 111 N. Y. 270, 278 (1888), 18 N. E. R. 852.

² *Boynton v. Sawyer*, 35 Ala. 407, 415; *Harrow v. Johnson*, 3 Met. (60 Ky.) 578; *Mantz v. Buchanan*, 1 Md. Ch. (1848), 202; *Campbell v. Campbell*, 30 N. J. Eq. 415, 416; *Creery v. Pearce*, 69 N. C. (1873), 67, 68; *Mandell v. McClave*, 46 Ohio St. 47; *Mathewson v. Smith*, 1 R. L. (1835), 28; *Peckham v. Hadwen*, 8 R. L. 160, 165; *Henagan v. Hardlee*, 10 Rich. Eq. (S. C., 1857), 285, 287; *Klinck v. Keck-*

ley, 2 Hill (S. C., 1835), Eq. 250, 252, 254. Where the testator and his wife had joined in the execution of the mortgage on her land, the proceeds of which were expended in building, and he left her a sum equivalent to half the amount thus borrowed with a life interest in the residue, the court held that he intended to assume the payment of the mortgage debt as his own. *Petition of Minot* (Mass.), 41 N. E. R. 63.

ceptance. In some states it has been held that a widow who has joined in the mortgage is entitled only to dower in the equity of redemption. Her dower is extinguished and released by and in execution of the mortgage. The land is not subject to her dower, nor can she claim, as against the residuary legatee or next of kin (and with much less reason as against judgment creditors), to have the personal property applied first to pay the mortgage debt.¹

§ 387. **The marshaling of assets in exoneration of mortgaged land.**—In the absence of statute, and if under a statute it appears that the testator intends that devised land shall be exonerated from a mortgage, the property of the deceased is marshaled as follows: 1st. The residuary personalty. 2d. Lands devised expressly for the payment of debts. 3d. Lands which the testator has not disposed of by his will; and 4th. Lands specifically devised which are charged with the payment of debts.²

And when it happens that the mortgaged land devised is included among the lands of the testator specifically devised charged with the payment of debts, and such land has in its turn to be resorted to, the mortgaged land will be required to contribute *pro rata*.³ Specific and pecuniary legacies are not, if the residue is exhausted, required to abate in exoneration of incumbered land devised, and the latter must then bear the incumbrance alone.⁴ If after money legacies are paid the

¹ *Hewitt v. Cox*, 55 Ark. 225, 232, 236; *Platt's Appeal*, 56 Conn. 572; *Whitehead v. Cummings*, 2 Ind. (1850), 58, 62; *Trobridge v. Sypher*, 55 Iowa, 352, 358; *Bank v. Owens*, 31 Md. (1869), 320, 326; *Vroncker v. Eastman*, 7 Met. (48 Mass.) 157; *Scott v. Hancock*, 13 Mass. 162; *Gibson v. Crehore*, 3 Pick. (20 Mass.) 475, 5 id. 146; *Rossiter v. Cossit*, 15 N. H. 38, 43; *Hawley v. Bradford*, 9 Paige (N. Y., 1841), 200; *Tabele v. Tabele*, 1 Johns. Ch. (N. Y., 1814), 45; *Titus v. Neilson*, 5 id. 452; *Bank v. Hinton*, 21 Ohio St. 509; *Danforth v. Smith*, 23 Vt. (1851), 247; *Daniel v. Leitch*, 13 Gratt. (Va.) 195; 1 *Scribner on Dower*, pp. 511-516.

² *Bartholemew v. May*, 1 Atk. 487; *Serle v. St. Eloy*, 2 P. W. 386; *Lomax v. Lomax*, 12 Beav. 285.

³ *Carter v. Barnardiston*, 1 P. W. 505; *Middleton v. Middleton*, 15 Beav. 450; *Harper v. Munday*, 7 D. M. & G. 369.

⁴ *Thomas v. Thomas*, 17 N. J. Eq. 356, 358; *Glass v. Dunn*, 17 Ohio St. 413, 422; *Hoff's Appeal*, 24 Pa. St. 200, 206; *Ruston v. Ruston*, 2 Dall. (Pa.) 243, 2 *Yeates* (Pa., 1796), 54, 63; *Gould v. Winthrop*, 5 R. I. 319, 323; *O'Neal v. Mead*, 1 P. W. 693. A residuary legatee who has been compelled to contribute to the exoneration of the mortgaged land may be subrogated as against land de-

residuum is not sufficient to exonerate the mortgaged land, it is extremely doubtful whether the money or specific legatees could be called on for contribution.¹

§ 388. **The statutory provisions construed.**—In states where, by statute, if land subject to a mortgage which was executed by the testator passes to a devisee, it is satisfied out of his own property unless a contrary intention shall expressly appear, it is necessary to determine what words shall constitute an expression of a contrary intention.² A direction that land shall be sold for the payment of debts, and charging them thereon, does not manifest a contrary intention; for these words relate only to debts for which recourse could be had to the executor and for which personal property was the primary fund.³

On the contrary, it has also been held that a general direction to pay debts out of the income or the proceeds of the sale of land devised in trust for the purpose would exonerate the mortgaged land, as it is a sufficient expression of a contrary intention.⁴ But a mere direction to an executor to pay debts out of the estate,⁵ or to pay them out of the real and personal es-

scended. See also *Andrews v. Bishop*, 5 Allen (87 Mass., 1862), 490, 493; *Cumberland v. Codrington*, 8 Johns. Ch. (N. Y.), 229, 257, 272; *Rogers v. Rogers*, 1 Paige, 183.

¹ *Lutkin v. Leigh*, Cas. T. Talb. 53; *Cope v. Cope*, 2 Salk. 449; *Hamilton v. Worley*, 4 Hare, 87; *Forresteer v. Leigh*, Amb. 171; 2 Roper, 956; 2 Williams, 1458. As between land specifically devised and land devised as part of a residue, the former is to be exonerated as against the latter. *Morris v. Higbie*, 27 Atl. R. 438. Cf. *Gibson v. McCormick*, 10 Gill & J. (Md.) 65.

² *Succession of Ralasse*, 47 La. Ann. 1126.

³ *Van Vechten v. Keator*, 63 N. Y. 52, 56; *House v. House*, 10 Paige (N. Y.), 158, 164. It did not appear that the testator was personally liable, but the court said that was immaterial. But *contra*, *Wells v. Wells*,

24 N. Y. S. 874, 30 Abb. N. Cases, 225. If the testator expressly directs land to be sold and the proceeds devoted to paying off mortgages, it must be done, though money legacies will abate. *Oviatt's Estate*, 10 N. Y. S. 264; *Rapalye v. Rapalye*, 27 Barb. (N. Y., 1857), 610, 620. The statutes do not apply to a mortgage entered into merely as a security for another person. *Cochrane v. Harver*, 54 Hun, 556. Cf. *Davis v. Davis*, W. N. 1876, 142.

⁴ *Bishop v. Howarth*, 59 Conn. (1890), 455, 465; *Allen v. Allen*, 30 Beav. 395, 400; *Stone v. Parker*, 1 Drew. & Sm. 212; *Maxwell v. Maxwell*, 23 L. T. 325.

⁵ *Mosely v. Marshall*, 27 Barb. 42; *Taylor v. Wendel*, 4 Bradf. 324; *Brownson v. Lawrence*, L. R. 6 Eq. 1; *Pembroke v. Friend*, 1 J. & B. 132; In re *Heydenfeldt*, 106 Cal. 434, 438.

tate,¹ is not such an expression of a contrary intention as will prevent the operation of the statute.

The provisions of some of these statutes do not apply to mortgages of personal property, as leaseholds,² though they do include equitable mortgages of real property created by the deposit of title deeds where a promissory note is given for the debt;³ but never vendors' liens, though such a lien is an incumbrance.⁴ Where a mortgage covers both real and personal property, to the latter of which the statute is not applicable, the mortgage debt must be apportioned between them.⁵

§ 389. **The wasting of the personal property does not cast debts upon the land.**—The wasting of the personal property by the executor will not give a general legatee the right to call upon the land, where the personal property was sufficient at the death of the testator to pay the legacies,⁶ even where their payment was charged upon the land as a secondary fund.⁷ And where one legatee has been paid his legacy in full, and the balance of the personal estate has been wasted by the executor, the other legatees cannot call upon the legatee for contribution.⁸ Thus, a pecuniary legatee who has been paid is not bound to make good a deficiency with the residuary legatee on a *devastavit* by the executor,⁹ unless he has permitted his legacy to remain with the executor, taking his receipt, and thus making the executor his debtor.¹⁰

¹ *In re Newmarch*, L. R. 9 Ch. D. 12; *In re Rossiter*, 13 Ch. D. 355.

² *Solomon v. Solomon*, 33 L. J. 473, 10 W. R. 540, 10 Jur. (N. S.) 331; *Gall v. Fenwick*, 43 L. J. Ch. 178; *Hill v. Wormsley*, L. R. 4 Ch. D. 665; *Lewis v. Lewis*, L. R. 18 Eq. 218, 225.

³ *Coleby v. Coleby*, L. R. 2 Eq. 808, 805.

⁴ *Barnwell v. Iremonger*, 1 Dr. & Sm. 255; *Hood v. Hood*, 26 L. J. Ch. 616.

⁵ *Tretrill v. Mason*, L. R. 7 Ch. D. 655; *Leonino v. Leonino*, L. R. 10 Ch. D. 460.

⁶ *Allen v. Mattison*, 39 Atl. R. 241 (R. I.); *Sims v. Sims*, 10 N. J. Eq. (1854), 161; *McCarthy v. McCartie* (1897), 1 Ir. 86.

⁷ *Richardson v. Morton*, L. R. 13 Eq. 123.

⁸ *Peterson v. Peterson*, L. R. 3 Eq. 111, 114.

⁹ *Dyose v. Dyose*, 1 P. W. 395; *Fonnerau v. Poyntz*, 3 Cox, 184; *Page v. Leapingwell*, 18 Ves. 466. *Contra*, *Gilbert v. Taylor*, 27 N. Y. 818, 76 Hun, 92.

¹⁰ *Ex parte Chadwin*, 3 Sw. 330; *Mallory v. French*, 11 Ir. Eq. 378. A creditor who negligently permits the executor to squander the personal property cannot enforce his debt against a specific or residuary legatee. His only remedy is upon the executor's bond or against him individually. *Wyse v. Smith*, 4 Gill & J. (Md.) 295.

§ 390. **The abatement of general legacies.**— General legacies are not applicable to the payment of debts until after the residuary personal estate, real estate devised in trust expressly for the payment of debts, or which is charged with their payment, and land descended to the heir, are all exhausted. The general legacies are then liable before the specific legacies, and if the sum total of the general legacies is not sufficient to pay debts, they will abate among themselves *pro rata* until all debts are paid before specific legacies can be resorted to.¹

A legacy of a specific chattel, or of securities, will be presumed to have been intended to pass to the legatee unconditionally and *in statu quo*. This would not take place if it were to be included with general legacies and subjected to the payment of debts and expenses of administration with them. The testator cannot discriminate against creditors by preferring the specific legatee as against them and releasing the property given specifically. But he can, *as between the persons who take under his will*, prefer the one to whom he gives property specifically pointed out, and that property will not, in the absence of a clear expression of a contrary intention, be liable to the claims of creditors until the fund by law first liable to the payment of debts, and also the general legacies, shall be exhausted.² An exception to this rule occurs where the payment of a general legacy is *expressly charged upon a specific legacy*, or is directed to be paid out of *all* the personal estate; and also if money legacies are given and there is not, and never was, a fund out of which to pay them, except the specific legacies which are also given. If the testator gives away *all* his prop-

¹ *Colbert v. Daniel*, 32 Ala. 314; 126; *Titus v. Titus*, 26 N. J. Eq. 114, *Kelly v. Richardson*, 100 Ala. 584; 117; *Haviland v. Cocks*, 6 Dem. Sur. *Hoffecker v. Clark*, 6 Del. Ch. (1888), 4; *Livingston v. Livingston*, 3 Johns. Ch. 148, 158 (N. Y., 1817); *Taylor v. Dodd*, 58 N. Y. 335; *Heath v. McLaughlin*, 115 N. C. 398, 20 S. E. R. 41; *Hospital v. Hayden*, 88 Md. 104, 34 Atl. R. 877; *Humes v. Woods*, 8 Pick. (Mass.) 478; *Towle v. Swasey*, 122 Mass. 100, 102, 105, 107; *Farnum v. Bascom*, 122 Mass. 282, 285; *Richardson v. Hall*, 124 Mass. 228, 233; *Johnson v. Home*, 152 Mass. 89, 93; *Hibler v. Hibler*, 104 Mich. 274, 277; *Van Nest v. Van Nest*, 48 N. J. Eq. 126; *Robertson v. Broadbent*, 8 App. Cas. 815.

erty in specific legacies, and also a money legacy, the former will abate with the latter, for otherwise it would be likely to fail altogether.¹

§ 391. **The abatement of annuities.**—Annuities payable generally out of the personal estate, or out of a blended fund charged with the payment of general legacies, abate with the latter upon a deficiency of assets,² unless they are bequeathed to the widow of the testator in lieu of dower, or in payment of a debt,³ or unless from the language of the will, or the circumstances of the testator or of his property, it is clearly evident that he intended that the payment of the annuity should be preferred.⁴

¹White v. Green, 1 Ired. Eq. (86 N. C.) 45, 53; White v. Beattie, 1 Des. Eq. 320; Biddle v. Carraway, 6 Jones' Eq. (59 N. C., 1860), 95, 101; Sayer v. Sayer, Prec. Ch. 392. Money legacies given for life with a remainder must abate, as between the life tenant and the remainderman, taxes and expenses of administration being paid out of the income as it accrues. Additional or substitutional legacies given by a codicil of course abate with legacies of the same class in the will. Wood v. Hammond, 16 R. I. 98, 17 Atl. R. 324. "The rules for the abatement of legacies and for contribution rest upon intention, either express or implied. Where the intention is not expressed a presumption of intention may arise from the character of the legacies themselves. Thus, if the testator shall point out specifically a particular thing to give a legatee, it may be presumed that he wishes him to have that and no other, if he does not part with it during his life. But this rule is neither arbitrary nor dependent upon any particular phraseology, for, if the testator shall in the same will give general legacies, and he either expressly declares that they shall be payable out of other specific legacies, or if it appears that they will all fail unless the specific lega-

cies shall abate, it will be presumed that the latter shall also be liable." Moore v. Moore, 50 N. J. Eq. 554.

²Bugbee v. Sargent, 23 Me. (10 Shep., 1843), 269; Fuller v. Winthrop, 3 Allen (85 Mass.), 32; Richardson v. Hall, 124 Mass. 228, 235; Veasey v. Whitehouse, 10 N. H. (1839), 409; Birdsall v. Hewlett, 1 Paige (N. Y., 1828), 32; Loder v. Hatfield, 71 N. Y. 92, 99; Hellman v. Hellman, 4 Rawle (Pa., 1829), 440; Richardson v. Bowen, 18 R. I. 138, 25 Atl. R. 908; Heatherington v. Lowenberg, 61 Miss. 372; Stanley v. Colt, 5 Wall. (73 U. S.) 119; Thwaites v. Foreman, 1 Coll. 409; Inness v. Mitchell, 1 Phil. 346; Miller v. Huddleston, 3 Mac. & G. 513; Sands v. Champlain, 1 Story, C. C. 376; Bent v. Culler, L. R. 6 Ch. App. 238; Fox v. Fox, L. R. 19 Eq. 236; Pott v. Baker, 2 Eng. L. & Eq. 92.

³Reed v. Reed, 9 Watts (Pa., 1840), 263; University's Appeal, 97 Pa. St. 187; Moore v. Alden, 80 Me. 301, 14 Atl. R. 199; Richardson v. Hall, *supra*; Towle v. Swasey, 106 Mass. (1871), 100, 105; Pollard v. Pollard, 1 Allen (83 Mass.), 490; Davenport v. Fletcher, Amb. 244; Heath v. Dindy, 1 Russ. 543; Blower v. Morrett, 3 Ves. 420; Additon v. Smith, 83 Me. 551, 23 Atl. R. 470. See also *post*, § 392.

⁴The English rule in abatement ascertains the value of the annuity

§ 392. **Priority among general legacies.**—A general legacy which is sustained by a valuable consideration, *e. g.*, one to a widow in lieu of dower, or one in payment of a debt which is due at the death of the testator, may claim full payment as against legatees who are only volunteers. Thus, a legacy accepted by the widow in lieu of dower does not abate with others, even though the legacy is more valuable than the dower,¹ provided the testator leave real estate of which his widow is dowable.² The widow is regarded as a purchaser for value.³ A legacy will not be saved from contribution by the meritorious character of the legatee, or by reason of his near relationship, as where the legatee is the father,⁴ brother or sister,⁵ niece,⁶ child,⁷ or wife of the testator,⁸ or by the fact that the testator considers himself under moral obligations to the legatee for services rendered as a matter of courtesy, where no legal obligation exists at the date of his death.⁹ Thus, a legacy to a creditor whose debt has been settled for a part of

according to the expectation of life of the annuitant. This value will be taken as a general legacy, and will abate *pro rata*; and the amount, less the deduction to make good the deficiency, will be paid at once to the annuitant. *Carr v. Ingleby*, 1 De Gex & Sm. 362; *Long v. Hughes*, 1 id. 364; *Inness v. Mitchell*, 1 Phil. 346, 716.

¹ *Lord v. Lord*, 23 Conn. 327; *Hubbard v. Hubbard*, 6 Met. (47 Mass., 1843), 50; *McLean v. Robertson*, 126 Mass. 537, 539; *Justice v. Justice* (N. J., 1889), 18 Atl. R. 674; *Duncan v. Franklin*, 43 N. J. Eq. (1889), 143, 10 Atl. R. 546; *Van Winkle v. Van Houten*, 3 N. J. Eq. 186, 192; *Williamson v. Williamson*, 6 Paige, 305; *In re Brooks' Estate*, 10 N. Y. S. 20; *Rowe v. Lansing*, 53 Hun, 210, 6 N. Y. S. 777; *In re McKay's Estate*, 5 Misc. 123; *McGlaughlin v. McGlaughlin*, 24 Pa. St. (1855), 22; *In re Wolfersberger*, 15 Pa. Co. Ct. R. 395; *Stuart v. Carson*, 1 Dessaus. Eq. (S. C.) 500; *Burridge v. Bradyl*, 1 P. W. 126; *Blower v. Morrett*, 2 Ves. 420; *Raven-*

hill v. Fletcher, Amb. 244; *Norcott v. Gordon*, 14 Sim. 258; *Webb v. Webb*, 2 Eq. Cas. Ab. 504, pl. 42; *Kightly v. Kightly*, 2 Ves. 228. See also *post*, Annuities.

² *Roper v. Roper*, L. R. 3 Ch. D. 714; *Acey v. Simpson*, 5 Beav. 35.

³ The testator may, of course, direct that a legacy which is in lieu of a claim against him shall be taken subject to abatement, and the legatee, if he accept the legacy, is estopped to claim his exemption.

⁴ *Hospital v. Hayden*, 83 Md. (1897), 104, 115, 34 Atl. R. 877.

⁵ *Towle v. Swasey*, 106 Mass. 100, 107.

⁶ *Emery v. Batchelder*, 78 Me. (1885), 238.

⁷ *Babbidge v. Vittum*, 156 Mass. 58, 30 N. E. R. 77; *In re Bixenstein*, 19 Pa. Co. Ct. R. 152; *Blower v. Morrett*, 2 Ves. 420; *In re Hardy*, 50 L. J. Ch. 241; *Miller v. Huddleston*, 3 Mac. & G. 526.

⁸ *In re Schweder* (1891), 3 Ch. 44.

⁹ *Duncan v. Franklin*, 43 N. J. Eq. 143, 145; *Turner v. Martin*, 1 De Gex, M. & G. 429.

its full value,¹ or to executors for their trouble,² or to servants,³ or to a person with whom the testator had agreed without consideration to give a legacy,⁴ is not preferred. The legatee has the burden of proving that his legacy is to be preferred over others of the same class because for a valuable consideration or otherwise, and he must do this by clear and unequivocal evidence appearing on the face of the will or from the circumstances.⁵ It is not sustained by a statement in the will that the amount was equitably due him,⁶ or that it was in consideration of services rendered,⁷ provided the testator was under no legal liability for them.⁸ The words *imprimis*, *in the first place*, etc., confer no priority in the payment of legacies, either among those thus numbered or over others. They merely point out the order in which the clauses were penned and not an intention to prefer legacies.⁹

§ 393. Exoneration of personal property specifically bequeathed.—A specific legatee of chattels may, even in the absence of an express direction, claim to have them exonerated by the executor, out of the general personal estate, from charges existing at the death of the testator.¹⁰ Thus, if the gift is a piece of furniture or jewelry which is pledged for a loan, or of shares or other securities which are hypothecated,¹¹ the debt must be borne by the residuary personal estate. But a thing given specifically, which is pledged for more than its value,

¹ *Coppin v. Coppin*, 2 P. W. 291, 296. preferred. *Sherman v. Baker* (R. L.

² *Attorney-General v. Robbins*, 2 P. W. 25; *Heron v. Heron*, 2 Atk. 171.

³ *Attorney-General v. Robbins*, *supra*.

⁴ *Nowack v. Berger*, 133 Mo. 24, 34 S. W. R. 489.

⁵ *Swasey v. Society*, 57 Me. (1869), 528; *Emery v. Batchelder*, 75 Me. (1883), 240; *Richardson v. Hall*, 124 Mass. 228; *Johnson v. Home*, 152 Mass. 89 (1890), 25 N. E. R. 44; *University's Appeal*, 97 Pa. St. 187.

⁶ *Hibler v. Hibler*, 104 Mich. 274, 279.
⁷ *Duncan v. Franklin*, 43 N. J. Eq. 143, 145, 10 Atl. R. 546.

⁸ A legacy in payment of services to be rendered the testator after his death, as, to recite masses, has been

1896), 40 Atl. R. 765.

⁹ *Gray's Estate*, 13 Phila. 246; *Everett v. Carr*, 89 Me. 325, 330; *McKay's Estate*, 5 Misc. R. 123, 25 N. Y. S. 725, 731; *Wells v. Barwick*, 50 L. J. Ch. 241; *Beeston v. Booth*, 4 Mad. 161; *Whitehouse v. Insole*, 7 L. T. 400; *Roper*, § 426.

¹⁰ *Robards v. Worthan*, 2 Dev. Eq. (17 N. C.) 173, 177; *Brainerd v. Cowdrey*, 16 Conn. 1; *Knight v. Davis*, 3 My. & K. 361; *Ellis v. Eden*, 25 Beav. 482; *Bothamley v. Sherson*, L. R. 20 Eq. 304, 314.

¹¹ Whether to secure a debt of the testator or that of another. *Bothamley v. Sherson*, L. R. 20 Eq. 304.

need not be redeemed. The legatee must have compensation to the amount of the value of the thing bequeathed.¹

A person to whom a lessee bequeaths his leasehold takes it subject to all its obligations. He must reimburse the lessor for dilapidations. He is responsible for damages accrued at the death of the lessee for the breach of a covenant to repair.² Rent due at the death of a testator, who is the lessee, comes out of the general personal estate. But rent which becomes due thereafter must be paid by the legatee.³ And where, by the terms of a lease, the testator was under a covenant to build, and died before he had performed, directing that his debts should be paid out of the general estate, it was held that the specific legatee was exonerated from carrying out the covenant to build.⁴

§ 394. *Liability of legatee of shares to calls.*— Whether a specific legatee of shares is personally liable for future calls depends wholly on the intention of the testator. If the testator, after bequeathing corporation shares which are not fully paid up, directs that *all his debts* shall be paid out of his estate, and he is, at the date of his death, under a covenant to pay the balance due on his shares, the agreement is a debt for which the testator is personally liable, to be paid out of the personal residuum, or out of any fund upon which the testator has charged the payment of debts.⁵ If, however, the interest of

¹ Bothamley v. Sherson, L. R. 20 Eq. 304. A lease of land is extinguished by a devise of the land by the lessor to the lessee. Hence, a charge upon the land thus devised will bear interest from the date of the death of the testator and not from the date of the expiration of the lease. Couch v. Eastham, 29 W. Va. 784, 3 S. E. R. 23.

² Hickling v. Bowyer, 16 Jur. 137, 3 Mac. & G. 643, also holding that as between the life tenant and the remainderman of a residue which includes the lease, the former is not liable.

³ Barry v. Harding, 1 Jo. & Lat. 475, 490; Fitzwilliams v. Kelly, 10 Hare, 266, 276.

⁴ Marshall v. Holloway, 5 Sim. 196, 208; Stevens v. Melcher, 154 N. Y. 551, 565. The property included in a specific legacy of a business, bequeathed on condition that the legatee shall take it *cum onere*, is liable for its proportionate share of the general indebtedness of the estate, though if the assets of the business are not sufficient to meet all its debts, the general personal estate must contribute. Kelly v. Richardson, 100 Ala. 584 (1892), 13 S. R. 785.

⁵ Armstrong v. Burnett, 20 Beav. 424, 437; Blount v. Hipkins, 7 Sim. 51, 55; Jacques v. Chambers, 2 Coll. 435, 11 Jur. 295; Clive v. Clive, Kay, 600. Where the executor has the shares transferred to his own name,

the testator in the shares is complete at his death, and nothing remains to be done to vest a title in him, the legatee of the shares will bear future calls.¹ Where the will is silent as to the payment of debts, the fact that the shares are not fully paid up is not always decisive. As respects some corporations, calls upon stock subscriptions partially paid, are certain to be made within a reasonable time, and then, particularly where the testator purports to bequeath the absolute title, it is fair to require the calls to be met out of the general personal estate. Where, as in the case of shares in an insurance company, only a very small percentage of the par value of shares is required to be paid in, and the balance is only to be paid in the case of a great loss involving the solvency of the company, it is unfair to the residuary legatee to keep the estate open, and to call upon him to meet calls which may be made years after the death of the testator and long after the specific legatee has participated in the profits and benefits which the corporation has enjoyed during the most prosperous period of its existence. But even in the latter case, if the specific legatee renounces the legacy of the share, he cannot be made liable, and the residuary legatee must pay.²

§ 395. General legacies, when abated.—Pecuniary legacies are payable out of the general personal estate remaining after the payment of debts; and if, after debts are paid, the personal property is insufficient to pay money legacies, and no other fund is provided for the payment of debts, the general legacies will have to abate. They cannot, in the absence of an intention to that effect, be paid out of the land of the testator, whether it descends or is devised specifically or generally. In the early equity cases in England legacies were permitted to be charged upon residuary land by the same words which charged it with simple contract debts. But by reason of the fact that at the present time all property of the testator is legal assets for the payment of all debts, much stronger language is now required.

he becomes personally liable for future calls, though the testator was under covenant to pay such calls so long as the shares continued in his name. *Armstrong v. Burnett, supra.*

¹ *Addams v. Ferick*, 26 Beav. 384; *Day v. Day* (1860), 1 Drew. & S. 261, 264.

² *Moffett v. Bates*, 3 Smale & G. 468, 473.

§ 396. **Language necessary to constitute a legacy a charge on land specifically devised.**—The real estate of the testator specifically devised is never charged with the payment of legacies, unless either the intention to charge pecuniary legacies upon it is expressly declared, or is to be necessarily implied from the context of the will, or from the facts and circumstances of the case. The presumption as between the specific devisee and pecuniary legatee is that the testator intends the money legacy to be paid first out of the personal property and next out of the real estate which is included in the residue. But the matter is wholly one of intention. The court will seek after the intention of the testator, and if it finds his meaning to have been that the specific devisee should take the land onerated with pecuniary legacies, it will be so decreed. The intention of the testator should be very clear, though explicit language is never required. If by implication, it must be a necessary implication, and the testator must clearly indicate that the particular piece of land specifically disposed of is to bear the burden of the legacies in favor of the personal property.¹

¹ *Goodwin v. Chaffee*, 4 Conn. 116; *Gridley v. Andrews*, 8 Conn. (1830), 5; *Mathewson v. Saunders*, 11 Conn. 148; *Wentworth v. Read* (Ill.), 46 N. E. R. 777, affirming 61 Ill. App. 539; *Heslop v. Gatton*, 71 Ill. (1874), 528; *Nash v. Taylor*, 83 Ind. (1882), 347, 349; *Davidson v. Coon*, 125 Ind. 497, 499; *Henry v. Griffis*, 89 Iowa, 543 (1893), 56 N. W. R. 670; *O'Brien v. Dougherty*, 1 App. Div. 148; *Bugbee v. Sargent*, 23 Me. (10 Shep., 1843), 269; *Quinby v. Frost*, 61 Me. 77; *Stevens v. Gregg*, 10 Gill & J. (Md.) 143; *Budd v. Williams*, 26 Md. (1866), 265; *Cissell v. Cashell*, 25 Atl. R. 306, 76 Md. 330; *Carroll v. Botsai*, 5 S. R. 823, 65 Miss. (1887), 350; *Van Winkle v. Van Houten*, 3 N. J. Eq. 186; *Weyman v. Ringold*, 1 Bradf. (N. Y.) 46; *Reynolds v. Reynolds*, 16 N. Y. 257; *Myers v. Eddy*, 47 Barb. (N. Y.) 263; *Clyde v. Simpson*, 4 Ohio St. 445; *Buchanan's Appeal*, 72 Pa. St. 448, 450; *Montgomery v. McElroy*, 3 W. & S. (Pa.) 371; *Tower's Appeal*, 9 W. & S. (Pa.) 103; *Hamilton v. Porter*, 63 Pa. St. 72; *Mosser v. Lesser*, 154 Pa. St. 84; *Hackadorn's Appeal*, 11 Pa. St. 86; *Wright's Appeal*, 13 Pa. St. 256; *Mellon's Appeal*, 46 Pa. St. 165; *Gilbert's Appeal*, 83 Pa. St. 348; *Walter's Appeal*, 95 Pa. St. 307; *Cable's Appeal*, 91 Pa. St. 329; *Appeal of Mann* (Pa.), 14 Atl. R. 270; *In re Duval's Estate*, 146 Pa. St. 176, 29 W. N. C. 242; *Addeman v. Rice*, 19 R. I. 30, 31 Atl. R. 429; *Phillips v. Clark*, 18 R. I. 627, 29 Atl. R. 688; *Cudworth v. Thompson*, 3 Des. (S. C.) Eq. 256; *Laurens v. Read*, 14 Rich. (S. C., 1868), Eq. 245, 251; *Kirkpatrick v. Chesnut*, 5 S. C. 216 (1873); *Allen v. Ruddall* (S. C., 1898), 29 S. E. R. 198; *Smith v. Mason's Ex'r*, 89 Va. 713, 17 S. E. R. 3; *Powers v. Powers*, 28 Wis. 659; *Wright v. Denn*, 10 Wheat. (U. S.) 204.

§ 397. Blending of real and personal property as showing an intention to charge legacies upon the land.—Where the testator bequeaths pecuniary legacies without providing a special fund for their payment, and subsequently mingles all his property, real and personal, in one common fund, which he disposes of as a residue, it will be presumed that he intends the legacies should be paid out of the real property comprised in the residue, in case the personal estate proves insufficient. The charge is said to be implied from a bequest of the blended residue. But it is submitted that a devise of “the rest, residue and remainder of an estate” is an express direction that legacies shall be paid out of the land, for there can be no gift of the residue or remainder unless what is before given shall be deducted from the *corpus* of the estate.¹ It is considered that the whole estate when thus blended constitutes one homogeneous mass; that the land is converted into personal property; and that so far as the legacies exceed the amount of the actual personal property left by the testator, the property which is converted by the blending should be devoted to the payment.²

¹ In *Cole v. Turner*, 4 Russ. 476, on page 479, the court says: “The freehold, copyhold and leasehold estates are not devised to the trustees, but the rest and residue of these estates; that is, what remains after some prior purpose is thereout satisfied. But what prior purpose could the testator here contemplate, except the satisfaction of the annuity and legacies previously given?”

² *Miller v. Couch*, 5 Del. Ch. (1877), 161; *Showalter v. Showalter*, 38 Ill. App. (1890), 208; *Reid v. Corrigan*, 40 Ill. App. 404, 30 N. E. R. 444; *Reid v. Corrigan*, 143 Ill. (1892), 402, 32 N. E. R. 387; *American Cannel Coal Co. v. Clemens*, 31 N. E. R. 786, 132 Ind. (1893), 163; *Hill v. Bean*, 86 Me. 200, 29 Atl. R. 986; *Wilcox v. Wilcox*, 13 Allen (95 Mass., 1866), 252; *Hayes v. Jackson*, 6 Mass. 149; *Peebles v. Acker*, 70 Miss. 356, 12 S. R. 548; *Mo-Queen v. Lily* (Mo. Sup.), 81 S. W. R. 1043; *Massaker v. Massaker*, 13 N. J. Eq. (1860), 264; *Dey v. Dey*, 19 N. J. Eq. 187, 139; *Corwine v. Corwine*, 24 N. J. Eq. (1874), 579, 582; *Paxson v. Potts*, 3 N. J. Eq. (1835), 313; *Kitchell v. Young*, 46 N. J. Eq. 506, 19 Atl. R. 729; *Turner v. Gibb*, 48 N. J. Eq. 526, 531, 22 Atl. R. 580; *First Baptist Church v. Syme*, 51 N. J. Eq. 363, 365, 28 Atl. R. 461; *Price v. Price*, 52 N. J. Eq. 326, 328, 29 Atl. R. 679; *Hamilton v. Smith*, 110 N. Y. 159, 17 N. E. R. 740; *Taylor v. Dodd*, 58 N. Y. 335; *Forster v. Civill*, 20 Hun (N. Y.), 537; *Tracy v. Tracy*, 15 Barb. (N. Y., 1853), 504; *Shulters v. Johnson*, 38 Barb. 80; *Church v. Wachter*, 43 Barb. (N. Y.) 43; *Briggs v. Carroll*, 117 N. Y. 288, 22 N. E. R. 1054; *Arthur v. Dalton*, 43 N. Y. Supp. 583; *Vanderhoff v. Lane*, 63 Hun (1892), 193, 17 N. Y. Supp. 712; *American Baptist Home Miss. Soc. v. Foote*, 52 Hun, 307, 5 N. Y. Supp. 236; *Hart v. Williams*, 77 N. C. (1877), 426; *Lassiter v. Wood*, 63 N. C. (1869), 360; *Perkins v. Caldwell*, 79 N. C. 441, 444; *Robinson v. McIvet*, 63 N. C. 645, 649;

But if there is sufficient personal property, legacies should be paid out of it without resorting to the real property;¹ and real estate is not liable to the payment of legacies, where, though included in the residuary clause, it does not go as general residue, but as a specific devise, as, for example, where it is described as "my lands;"² for the mere fact that the testator, in disposing of his residue, specifically mentions certain particular gifts which are comprised in the residue, does not alone show an intention that legacies shall not be paid out of it.³

Moore v. Beckwith, 14 Ohio St. (1862), 129; English v. Harvey, 2 Rawle (Pa., 1832), 305; Hackadorn's Appeal, 11 Pa. St. 89; McCreay's Appeal, 47 Pa. St. (1864), 442, 450; Gallagher's Appeal, 48 Pa. St. 121, 122; Davis' Appeal, 73 Pa. St. 348, 352; Appeal of Chilcot, 134 Pa. St. 240, 19 Atl. R. 850, 26 W. N. C. 256; Collins v. Reid, 148 Pa. St. 189, 30 W. N. C. 52; In re Markley's Estate, 148 Pa. St. 538, 541, 24 Atl. R. 75; In re Weller's Estate, 169 Pa. St. 66, 32 Atl. R. 101; In re Watt's Estate, 168 Pa. St. 422, 428, 32 Atl. R. 42, 36 W. N. C. 369; Mathewson's Petition, 12 R. I. (1878), 145; Moore v. Davidson, 22 S. C. (1884), 94, 101; Jaudon v. Ducker, 27 S. C. 295, 297; In re Jamieson, 18 R. I. 385, 28 Atl. R. 333; Belcher v. Belcher, 16 R. I. 72, 12 Atl. R. 230; Hutchinson v. Gilbert (Tenn.), 7 S. W. R. 126; Lee v. Lee, 88 Va. 805, 14 S. E. R. 534; Bird v. Stout (W. Va., 1895), 20 S. E. R. 852; Hiner v. Root's Heirs, 81 Wis. (1892), 263, 267, 51 N. W. R. 435; Lewis v. Darling, 16 Howard (57 U. S., 1853), 1; In re Campbell (1893), 8 Ch. 468; Hassel v. Hassel, 2 Dick. 527; Bench v. Biles, 4 Mad. 187; Smith v. Butler, 1 Jo. & Lat. 692; Cole v. Turner, 4 Russ. 376; Morehouse v. Scaife, 2 My. & Cr. 695; Francis v. Clemow, Kay, 435; Wheeler v. Howell, 3 K. & J. 198; Greville v. Brown, 7 H. L. Cas. 689; Stevens v. Fowler, 1 Dick. 340; Merritt v. Merritt, 3 Dick. 1; Carroll v. Hargave,

5 Ir. R. Eq. 123; Gainsford v. Dunn, L. R. 17 Eq. 405; Brooke v. Rooke, L. R. 3 Ch. Div. 630; In re Bellis Trust, L. R. 5 Ch. Div. 504; Bray v. Stevens, L. R. 12 Ch. Div. 162; Gyett v. Williams, 2 J. & H. 429; Bawden v. Cresswell, 1 Ch. 603, 8 Rep. 76.

¹ Amer. Cannel Coal Co. v. Clemens, 182 Ind. 163, 31 N. E. R. 786; Tallman v. Tallman, 23 N. Y. S. 734, 3 Misc. R. 465. A devise of the residue of land absolutely, with "full power of disposal," does not, of course, prevent its application if necessary to pay pecuniary damages. Stevens v. Flower, 46 N. J. Eq. 340, 19 Atl. R. 777.

² Belcher v. Belcher, 16 R. I. 72, 12 Atl. R. 230. An annuity in lieu of dower, if followed by a residuary devise of a blended fund, will be a charge on the land in case the personalty is insufficient. Conrad's Appeal, 33 Pa. St. (1859), 47.

³ Bray v. Stevens, L. R. 12 Ch. D. 162. The mere fact that the residue of the real property of a testator is devised to one to whom a specific devise of land is *also* given does not make a pecuniary legacy a charge upon the land *specifically devised*. Pitkin v. Peet (Iowa), 68 N. W. R. 705; Phillips v. Clark, 18 R. I. 627 (1893), 29 Atl. R. 688. Though the legacy may then be a charge upon the real property included in the residue. Phillips v. Clark, 18 R. I. 627, 29 Atl. R. 688.

The implication of a charge of legacies on land arising from the blending of real and personal property in a residuary gift is not conclusive. Its application may be restrained or avoided by other language showing a contrary intent.¹ Some of the cases require something more than a mere blending of the real and personal property in a residue, after the giving of money legacies, to make the legacies a charge upon the land. There must be some indication of an intention that the legacies shall be payable out of the land to make it liable, even though the personal property shall prove insufficient. The giving of a *residue* or a *remainder* may mean what remains after the payment of debts and funeral expenses; and if *their* payment exhausts the personal property which is included in the residuum, then legacies will abate. Where this view is held, a direction "to pay legacies out of the estate" is not enough to charge the land, for the testator evidently meant the estate which was by law in the hands of the executor.² But the rule of blending is applicable though no specific devises of land except that in the residuary clause has been made by the testator.³ And the fact that the testator devises land specifically after pecuniary legacies which he expressly charges on his estate, and disposes of all the residue of his personal and real property in one mass, does not show an intention that the legacies shall be charged upon the land specifically devised; for if the residuary personality proves insufficient, they are charged upon the real estate included under the residuary clause.⁴

§ 398. Direction that a devisee shall pay a legacy constitutes it a charge.—The rule is well settled that where real property is devised to a person, and he is also directed by the testator to pay a legacy out of the income or rents and profits, the legacy is an equitable charge upon the land devised.⁵ The

¹ *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614, 623; *Clery's Appeal*, 35 Pa. St. (1859), 54; *Mathewson's Petition*, 12 R. L. (1878), 145; *Laurens v. Read*, 14 Rich. Eq. (S. C., 1868), 243, 245.

² *Swift v. Edson*, 5 Conn. 531.

³ *Turner v. Gibb*, 48 N. J. Eq. 526, 532, 22 Atl. R. 580; *Miller v. Sandford*, 33 N. J. Eq. (1880), 427; *Lewis v. Darling*, 16 How. (57 U. S.) 1; *Moore*

v. Beckwith, 14 Ohio St. 135; *Bench v. Biles*, 4 Madd. 187; *Francis v. Cle-mow, Kay*, 435; *Wheeler v. Howell*, 3 Kay & J. 198.

⁴ *Spong v. Spong*, 1 Y. & J. 300, 3 Bligh (N. S.) 84, 1 D. & Cl. 365; *Conron v. Conron*, 7 H. L. C. 168; *Chase v. Davis*, 65 Me. (1876), 102; *Robinson v. McIver*, 63 N. C. (1869), 645, 649.

⁵ *Daly v. Wilkie*, 111 Ill. 382; *Porter*

form of the language is immaterial if the intention to charge the legacy on the land is clear. Thus, by a direction that a devisee shall *pay* a legacy out of the property,¹ a devise to A., "*he paying*" certain legacies mentioned,² a devise "on condition,"³ or "*provided*" the devisee shall pay,⁴ "in consideration of his paying,"⁵ and by a direction that the legatee *shall pay*,⁶ or if he choose to accept then he *is to pay*,⁷ or a devise of land *after paying* a legacy,⁸ a charge of the legacy upon the land is created.⁹

A direction by the testator that a money legacy shall *be paid*

v. Jackson, 95 Ind. 210, 214; Davidson v. Coon, 125 Ind. 497, 500; Manifold v. Jones, 117 Ind. 212, 214; Castor v. Jones, 86 Ind. (1882), 289, 294; Barnhart v. Barnhart, 127 Ind. 397 (1890), 26 N. E. R. 895; Henry v. Griffin, 89 Iowa, 548 (1894), 56 N. W. R. 670; Limas v. Neidt (Iowa), 70 N. W. R. 203; Cady v. Cady, 67 Miss. 425 (1889), 7 S. R. 216; Taft v. Morse, 4 Met. (45 Mass.) 523, 527; Van Rensselaer v. Van Rensselaer, 21 N. E. R. 75, 113 N. Y. 207; Colvin v. Young, 81 Hun, 116, 80 N. Y. Supp. 689; Rice v. Rice, 115 N. C. 43, 45; Carter v. Warrell, 96 N. C. 358, 2 S. E. R. 528; Hunt v. Wheeler, 21 S. E. R. 915, 116 N. C. 422, 424; Decker v. Decker, 3 Ohio (1827), 157; Nellous v. Truax, 6 Ohio St. (1856), 97; West v. Donaldson, 7 W. & S. (Pa., 1844), 407; In re Duvall's Estate, 146 Pa. St. 176, 29 W. N. C. 242, 23 Atl. R. 231; Baylor v. Dejarrette, 13 Gratt. (Va., 1856), 152; Powers v. Powers, 28 Wis. 659, 661; Gardner v. Gardner, 3 Mason C. C. (1823), 178, 13 Wheat. (25 U. S.) 493. If a legacy is expressly charged on the land specifically devised, the personal property is of course wholly exempt from its payment, irrespective of the fact that the personalty is more than sufficient for that purpose. Wyckoff v. Wyckoff, 24 Atl. R. 863, 49 N. J. Eq. 844.

¹ Eddy v. Kelly (Minn.), 74 N. W. R. 1020.

² Hellman v. Hellman, 4 Rawle (Pa.,

1834), 440; Tower's Estate, 9 Watts & S. 103.

³ Pendleton v. Kinney, 65 Conn. 222; Bugbee v. Sargent, 23 Ma. 269.

⁴ Morancey v. Quarles, 1 McLean C. C. (1834), 194; Birdsall v. Hewlett, 1 Paige (N. Y.), 32; Pryer v. Mark, 129 Pa. St. 529, 19 Atl. R. 529; Haskett v. Alexander, 184 Ind. 543; Dobbins v. Stevens, 17 S. & R. (Pa.) 13.

⁵ Sands v. Champlin, 1 Story C. C. (1840), 376.

⁶ Harris v. Fly, 7 Paige (N. Y.), 421.

⁷ Wright's Appeal, 12 Pa. St. 256.

⁸ Hanna's Appeal, 31 Pa. St. 53.

⁹ The circumstances that the legatees are the testator's next of kin, that no other provision is made for them, and that, if their legacies fail, they will have nothing, may indicate that as between them and the residuary devisee, who is a stranger, the testator meant to charge their legacies on the land. Turner v. Gibb, 49 N. J. Eq. 526, 22 Atl. R. 470. This same rule or presumption applies to a legacy given to the son of the testator for his education. Briggs v. Briggs, 117 N. Y. 288, 291. The fact that the residuary devisee, though not a relative, had been for many years supported by the testator, while the legatee was his nephew, may overcome any inference that the legacy was to be paid out of the land, where an unexpected deficiency of personal property occurred. Brill v. Wright, 19 N. E. R. 628, 112 N. Y. 129.

out of his estate does not *alone* make the legacy a charge upon the land to the exoneration of the personal property. Such a direction is generally a mere formula, and, where the personality which is by law liable *is sufficient*, and *no lands have been given to the executor*, it furnishes no reason for charging money legacies upon land specifically devised.¹ On the other hand, where land is devised *with the personal property to the executor*, or where land is specifically devised to A. with a direction that legacies are to be paid by A. out of the particular estate thus given to him, the legacies will be a charge upon the land though there shall be no deficiency of personal assets.²

The distinction between a general devise *in trust of all the real and personal property* of the testator, followed by a gift of legacies, and a direction to pay a certain legacy out of the proceeds of land ordered to be sold, is extremely important. In the former case, though the *whole estate is devised upon trust to pay* legacies, they are nevertheless primarily payable out of the personal property. But where the devise is of land *to be sold*, and a legacy is directed to be paid *out of the proceeds*, it is a specific legacy payable solely out of that land or its proceeds, and the personal property is in no event liable to pay the legacy.³

¹Martin v. Goode, 111 N. C. 288, 16 S. E. R. 232; Langworthy v. Golden, 28 Ill. App. 119; Longacre v. Stiver, 135 Ind. 584, 35 N. E. R. 900; Beck v. Kallmeyer, 42 Mo. App. 563. *Contra*, Davidson v. Coon, 125 Ind. 497, 25 N. E. R. 601.

²Sheldon v. Purple, 15 Pick. (32 Mass., 1834), 528, 529, 533; Taft v. Morris, 4 Met. (45 Mass.) 523, 527; Hartson v. Elder, 50 N. J. Eq. 522, 26 Atl. R. 561; Hunt v. Hunt, 4 Gray (70 Mass., 1855), 190; Jackson v. House, 17 Johns. (N. Y., 1819), 281; Taylor v. Dodd, 58 N. Y. 335; Bray v. Lamb, 2 Dev. Eq. (17 N. C.) 372.

³Phipps v. Annesley, 2 Atk. 57; Reade v. Litchfield, 3 Ves. 475; Ion v. Ashton, 28 Beav. 379; Boughton v. Boughton, 1 H. L. Cas. 406; Spurway v. Glynn, 9 Ves. 483; Noel v. Lord Hanley, 7 Price, 241. A specific de-

vises of a parcel of land to be valued at a certain figure, as of a farm "to my son at \$5,000," does not constitute that amount a charge upon the land by necessary implication, unless, from the whole will, it clearly appears that the testator meant that the devisee should pay the amount specified to the executor for the benefit of the personal estate. Knaub v. Meyers, 144 Pa. St. 322, 22 Atl. R. 814; Hart v. Homiller, 23 Pa. St. 39 (1854); Baker's Appeal, 59 Pa. St. (1868), 313. See also Browder v. Jackson, 3 Lea (71 Tenn.), 151. On the other hand, it has been held that a devise of land *to be valued* at a certain amount in gross or per acre is not a devise of the land, but of an option of purchasing the land from the residuary beneficiaries at the price named (Wyckoff v. Wyckoff, 49 N. J. Eq.

§ 399. When a legacy is charged by a devise of land "after the payment of the legacy."—A *specific devise* of land is not charged with the payment of general legacies to the exoneration of the personal estate by a subsequent residuary devise of the testator's land "*after the payment of legacies.*"¹ But a residuary devise of land "*after the payment of debts and legacies,*" or coupled with any direction which shows that the enjoyment of the land thus devised is to be postponed until *all* legacies are paid, and particularly where real and personal property are blended,² must be taken as conclusive evidence of an intention that the legacies shall be a charge upon the land included in the residue if the personal property is not sufficient.³ And a devise of land, whether specific or residuary, *subject to the payment of legacies*, is charged with their payment whether or not there shall be a deficiency of the personal estate to pay them.⁴

§ 400. Whether provisions for the support of a legatee by a devisee are conditions or charges upon land devised.—The question frequently arises whether the testator, intending to provide for the support, education and maintenance of a

344, 25 Atl. R. 968, 48 N. J. Eq. 118, 21 Atl. R. 287), which goes to them as personal property. A person who has an option under the will to purchase from the executors does not take *under the will*, but by purchase from them, and consequently is not entitled to the benefit of a lapsed legacy charged upon the land, though he may claim the rents from the date on which the option accrued to him. In *re* Champion's Estate, 15 N. Y. S. 768. A provision that devisees shall pay certain sums for equality of division creates a personal debt only in the absence of a clear expression of an intention that the sums shall be a charge upon the land. *Sauer v. Mollinger*, 22 Atl. R. 39, 138 Pa. St. 338. A devise of land, provided the devisee shall pay a certain sum to the estate, is merely a direction that the devisee shall have the privilege of purchasing the land,

and in case he shall fail to do this the land lapses into the residuum or goes to the testator's heirs. *Ditmas v. Baas*, 66 Hun, 632, 21 N. Y. S. 201.

¹ *Newsom v. Thornton*, 82 Ala. (1886), 402, 8 S. R. 261.

² *Ante*, § 397.

³ *Atmore v. Walker*, 46 Fed. R. 429; *King v. King*, 14 R. I. (1888), 146, 516; *Hunt v. Wheeler*, 116 N. C. 422, 424, 21 S. E. R. 915; *Funk v. Eggleston*, 92 Ill. 515; *McCreedy's Appeal*, 47 Pa. St. (1864), 442.

⁴ *Daly v. Wilkie*, 111 Ill. (1884), 882; *Bugbee v. Sargent*, 23 Me. (10 Shep., 1843), 269, 27 Me. 388; *Merritt v. Bucknam*, 78 Me. (1886), 504; In *re* Lefevre's Estate, 171 Pa. St. 404; *Thorp v. Munroe*, 47 Hun, 246; *Newman's Appeal*, 35 Pa. St. (1860), 339; *Wertz's Appeal*, 69 Pa. St. (1871), 178; *Mann's Appeal* (Pa., 1888), 14 Atl. R. 270; *Carroll v. Botsai*, 65 Miss. 350, 5 S. R. 823. See also *ante*, § 396.

legatee, has made them a charge upon land devised, or whether the furnishing of the support constitutes a condition precedent or subsequent to the holding of that land. If the support of the legatee is merely a charge upon the rents of the land itself, it is payable out of its rents and profit *only*, and the devisee is not *personally liable*. And if it is a condition precedent, the performance of which becomes impossible by reason of the death of the person to be supported before the testator, the charge sinks into the land, and the devisee takes the land unincumbered. On the other hand, if it is a condition subsequent, not only will the title to the land be defeated by its breach, and the heirs of the testator have a right to re-enter upon the land devised, but the legatee, in such cases, as is subsequently explained, will have a right of action, in debt or *assumpsit*, against the devisee, and may recover a judgment against him personally for the arrears of support and maintenance.¹ The employment of the words "upon condition that the devisee shall support a legatee" is not always conclusive as to the personal liability of the devisee. Many cases hold that a gift of land in these terms constitutes an estate upon condition subsequent, defeasible on breach of condition,² but which imposes no personal liability upon the devisee, nor any lien upon the land which will affect it in the hands of a *bona fide* purchaser for value. But the majority of the cases hold that a devise upon condition to support a legatee or to pay a sum of money does not create an estate upon condition subsequent, but that the devisee takes an *absolute title subject to a charge*, and that, where he enters on the land and receives the rents and profits, he becomes personally liable to the legatee for the support or payment by reason of the circumstances of the case.³

§ 401. **The personal liability of the devisee.**—Where the payment of a legacy is by the will made a condition of the devise, the acceptance of the land by the devisee will create a personal liability upon the part of the devisee, which may be enforced against him by an action of debt by the legatee be-

¹ *Post*, § 401.

² *Morse v. Hayden*, 82 Me. 227, 19 Atl. R. 227; *Irvine v. Irvine* (Ky.), 15 S. W. R. 511; *Jennings v. Jennings*, 27 Ill. (1862), 518; *Hoss v. Hoss*, 140

Ind. 551, 39 N. E. R. 255; *La Chapelle v. Burpee*, 28 N. Y. Supp. 453, 69 Hun, 436; *Rhett v. Mason*, 18 Gratt. (Va.) 541.

³ *Post*, § 401.

fore resorting to the land.¹ The payment of the legacy is regarded as the consideration for the land devised, and the action of the devisee in accepting the land and enjoying its income is an implied promise that he will pay the legacy to the person pointed out by the testator.² And the legacy may, at the same time, remain as a charge upon the land, which may be enforced in equity as a lien in the hands of any person to whom it has been conveyed with actual or constructive notice, and the devisee also be personally liable.³

§ 402. Support of legatees a charge on land — When residence on land is required.— A direction by the testator that his widow is “to have a home and support during life,” on a farm devised to another,⁴ that a devisee shall bear the expense of maintaining and educating legatees named,⁵ or shall support a

¹Towner v. Tooley, 38 Barb. 598.

²Or to his assignee. Erwin v. Erwin, 115 N. C. 366.

³Lord v. Lord, 22 Conn. 602; Olmstead v. Burch, 27 Conn. (1858), 530; Daly v. Wilkie, 111 Ill. 382; Porter v. Jackson, 95 Ind. 210, 214; Lindsey v. Lindsey, 45 Ind. (1874), 552; Wilson v. Piper, 77 Ind. (1881), 437; Cann v. Fidler, 86 Ind. 244; Lofton v. Moore, 83 Ind. 112; Sanders v. Sanders, 3 Bibb (6 Ky., 1814), 286; Fuller v. Fuller, 84 Me. 475, 24 Atl. R. 946; Tolson v. Tolson, 10 Gill & J. (Md., 1838), 159; Collins v. Carman, 5 Md. (1854), 523, 527; Meakin v. Duvall, 43 Md. 372; Adams v. Adams, 14 Allen (96 Mass., 1867), 65; Farwell v. Jacobs, 4 Mass. 634; Swasey v. Little, 7 Pick. (24 Mass.) 296; Crocker v. Crocker, 11 Pick. (Mass.) 252; Sheldon v. Purple, 15 id. 528, 533; McKenzie v. Ashley, 145 Mass. 577, 15 N. E. R. 88; Red v. Powers, 69 Miss. (1891), 242, 245, 13 S. R. 586; Pickering v. Pickering, 6 N. H. (1832), 120, 123; Wyckoff v. Wyckoff, 49 N. J. Eq. 344, 25 Atl. R. 963; Harris v. Fly, 7 Paige (N. Y.), 421; Birdsall v. Hewlett, 1 id. 32; Gridley v. Gridley, 24 N. Y. 180, 136; Fox v. Phelps, 17 Wend. (N. Y., 1837), 293; Spraker v. Van Alstyne, 18 id.

200, 205; Wheeler v. Lester, 1 Bradf. (N. Y.) 293; Smith v. Smith, 48 Hun, 617; Aston v. Galloway, 3 Ired. (36 N. C., 1841), 126; Patterson v. Patterson, 63 N. C. (1869), 322; Rice v. Rice, 115 N. C. 43, 45; Fuller v. McEwen, 17 Ohio St. 288; Case v. Hall (Ohio), 38 N. E. R. 616; Hanna's Appeal, 81 Pa. St. 53; Renner v. Headley, 129 Pa. St. 542, 18 Atl. R. 549; Shillito v. Shillito, 160 Pa. St. 167, 34 W. N. C. 136; Evans v. Foster, 86 Wis. 509, 515; 3 Williams, Executors, 1931. This is the rule, though the value of the legacy was greater than that of the land devised. Brown v. Knapp, 79 N. Y. 136. And though upon the death of the devisee to whom the land has been given charged with a legacy, the land itself shall descend to the legatee. Case v. Hall (Ohio, 1897), 38 N. E. R. 618. If the direction is that a devisee shall pay out the proceeds of land he is not personally liable. Hunkypillar v. Harrison, 59 Ark. 453 (1894), 27 S. W. R. 1004.

⁴Estate of Goodrich, 38 Wis. 492, 498.

⁵Cady v. Cady, 67 Miss. 425; Thayer v. Finnegan, 134 Mass. 62.

person mentioned so long as she may live with *him*,¹ or directing an executor to pay the income of land to A. for his support,² or similar language providing for the support of a legatee, constitutes the support of that person a charge upon the land.³ Legacies of this sort are very common, but are open to the objection that so far as they exempt the devisee from personal liability, and are solely a lien upon the land, they are difficult of enforcement, when, by the sale of the land, it goes into the hands of strangers.⁴

The intention to charge the land with the support of the legatee may be inferred from slight language. Thus, a gift of the whole estate to A., and giving to his care and protection the support of testator's daughter, was held to create a charge, the words not being precatory.⁵ But a direction that A. shall have his support out of land which the testator has devised to others does not constitute a charge, nor does he take a life estate in the land. The person to be supported need not, of necessity, reside with the devisee, unless the will requires him to do so.⁶ If, however, upon the whole will it is evident that his residence on the land devised is indispensable, so that he is only to be supported when he is a part of the family of the devisee, his voluntary absence absolves the devisee from liability therefrom.⁷ Support and education as a member of the devisee's family, *without payment of money*, are a reasonable performance of the condition to educate and support a legatee.⁸ And where the character of the education and support is not specifically mentioned, the provisions made therefor by the devisee should

¹ *Crossett v. Clements* (Miss., 1890), 7 S. R. 207.

² *Clark v. Marlow*, 149 Ind. 41, 43, 48 N. E. R. 359.

³ *Bell v. Watkins* (Ga., 1898), 30 S. E. R. 756; *Brown v. Hord* (Ky.), 15 S. W. R. 874; *Jennings v. Sturdevant*, 140 Ind. 645, 40 N. E. R. 61; *Downes v. Long*, 79 Md. 382; *Laxton v. Tilley*, 66 N. C. 327; *Outland v. Outland*, 118 N. C. 138, 141, 23 S. E. R. 972; *Dodge v. Hogan*, 19 R. I. 4, 31 Atl. R. 1059; *Dickson v. Field*, 77 Wis. 439, 445; *Allen v. Boomer*, 82 Wis. 364, 372, 52 N. W. R. 428.

⁴ *Craven v. Bleakney*, 9 Watts (Pa.,

1839), 19; *Steele's Appeal*, 47 Pa. St. (1864), 437; *Pringle v. Marshall*, 25 Atl. R. 629, 152 Pa. St. 603, 608, 33 W. N. C. 261.

⁵ *Bank of Florence v. Gregg*, 46 S. C. 169, 183, 24 S. E. R. 64; *In re Pringle's Estate*, 21 Atl. R. 79, 138 Pa. St. 570, 27 W. N. C. 225.

⁶ *Dickson v. Field*, 77 Wis. (1890), 439, 445.

⁷ *Forbes v. Darling*, 54 N. W. R. 385 (1893), 94 Mich. 621; *Dickson v. Field*, 46 N. W. R. 668, 77 Wis. 439, 445.

⁸ *Conover v. Fisher* (N. J. Ch.), 86 Atl. R. 948; *Dickson v. Field*, 77 Wis. 439, 445.

be proportionate to the value of the property devised, which is charged with it, and to the social conditions of all the parties involved.¹

§ 403. **The lien of the charged legacy.**—Where a will creating a charge upon land, either of debts or legacies, is probated and recorded, a lien is created of which all subsequent purchasers are bound to take notice.² The lien of the charge is superior to the claim of dower by the widow of the devisee. She is not entitled to have her dower *wholly exonerated* from the charge as between her and the heir of the devisee, but must pay a sum equal to the interest on the legacy for her life at compound interest according to the mortality tables.³ But the lien is divested by the involuntary sale of the land as under an execution against the devisee. The proceeds of the sale take its place and the charge is transferred to that. The lien of the charge on the proceeds is superior to the lien of the judgment in favor of the creditor of the devisee; and the legatee may enforce his right by an action in a court of common law, against the sheriff, to have his legacy paid out of the money in the hands of the latter.⁴

§ 404. **Extinguishment or merger of a charge.**—Where the title to land and the title to the legacy which is a lien upon it are united in the same person, the two will be merged, the lien of the charge extinguished and the land forever freed from it, unless it shall appear necessary, just and equitable to keep it alive for the protection of the legatee.⁵ If the legacy

¹ *Watt v. Pittman*, 25 N. E. R. 191, 125 Ind. 168. It is doubtful, where the devisee has a full discretion as to the character and amount of the support furnished, whether the legatee could recover the difference between that which has been given, and what would be reasonable under the circumstances (*Forbes v. Darling*, 54 N. W. R. 385, 94 Mich. 621), unless there is a total repudiation of the duty imposed, or a very arbitrary exercise of the discretion. *Collister v. Fassitt*, 48 N. Y. S. 792.

² *Wilson v. Piper*, 77 Ind. 437, 441; *Nash v. Taylor*, 83 Ind. (1882), 347, 348; *Coleman's Heirs v. Howell*, 16

Atl. Rep. 202 (N. J.); *Peebles v. Acker*, 70 Miss. 356, 12 S. R. 248; *Johnson v. Johnson*, 98 Ill. 564; *Taft v. Morse*, 4 Met. (Mass.) 523, 528; *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. R. 351. The purchaser must show that he was an innocent purchaser, and for a valuable consideration.

³ *Harper v. Vaughan*, 87 Va. 426, 19 S. E. R. 785.

⁴ *Pryer v. Mark*, 129 Pa. St. (1889), 529, 19 Atl. R. 895; *Truby's Appeal* (Pa., 1888), 11 Atl. R. 567.

⁵ *Boyd v. Sachs*, 78 Md. 491, 26 Atl. R. 391; *Harman's Appeal*, 135 Pa. St. 441; *Dodge v. Hogan*, 19 R. I. 4, 31 Atl. R. 268.

which is a charge upon land is invalid, or lapses or fails, the charge is extinguished and sinks into the devise for the benefit of the devisee. He takes the land disincumbered of the lien of the legacy charged.¹ A distinction is made between a charge and a trust which materially affects the interest of the heir or residuary devisee. Where land is devised charged with the payment of a legacy, it is given for a particular purpose, and, so far as the accomplishment of that particular purpose does not exhaust it, the devisee is to take beneficially. The testator intends him to take beneficially minus the deduction for the carrying out the particular purpose, and if this purpose fails his interest is augmented to that extent. But a devise in trust to pay legacies is for a particular purpose and *no other*. The intention is not to give the devisee any beneficial interest in any event. Hence, if the purpose of the trust fails wholly or in part, the beneficial interest does not merge in the legal for the devisee's benefit, but he continues to hold in trust for the heir as the trustee of a resulting trust.²

¹ And it seems immaterial whether the legacy is a charge upon the proceeds of the land when sold or only upon its rents and profits. *Jackson v. Hurlock*, 2 Eden, 255, 263; *Henchman v. Attorney-General*, 9 My. & K. 485, 493; *Kennell v. Abbott*, 4 Ves. 202. *Powers v. Ebelhoff*, 56 Ill. App. 606; *Cooke v. Stationers' Co.*, 8 My. & K. 262, 264; *Tregonwell v. Sydenham*, 8 Dow, 210; *King v. Dennison*, 1 Ves. & B. 260, 272; *Wright v. Horn*, 8 Mod. 222; *Arnold v. Chapman*, 1 Ves. Sr. 108. See also § 328, *ante*.

CHAPTER XIX.

THE CLASSIFICATION, ADEMPION AND PAYMENT OF LEGACIES.

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| <p>§ 405. General legacies defined and distinguished from specific legacies.</p> <p>406. Demonstrative legacies—Their nature and when they abate.</p> <p>407. Specific legacies defined—Money legacies, when specific.</p> <p>408. Specific legacies of stock, debts and securities.</p> <p>409. Incidents of specific legacies—Right to interest and dividends on securities specifically bequeathed.</p> <p>410. The ademption of specific legacies—Ademption by removal.</p> <p>411. The <i>animus adimendi</i>.</p> <p>412. Specific legacies of animals and other personal chattels.</p> <p>413. The ademption of legacies of debts and stock by payment and sale.</p> <p>414. Legacies of debts and securities are specific—Ademption by payment.</p> <p>415. Ademption of land specifically devised—Partial modification of interest.</p> <p>416. Definition and classification of repeated legacies—Cumulative and substitutional legacies defined.</p> <p>417. Repetition of a legacy of a specified thing to the same person.</p> <p>418. Repetition of legacies of money—Presumption arising from gifts by different instruments.</p> <p>419. Repetition of legacies by the same instrument.</p> | <p>§ 420. Repetition of legacies by different instruments and prompted by different motives.</p> <p>421. Parol evidence to show character of legacies.</p> <p>422. The intention of the testator as respects the repetition of legacies.</p> <p>423. Substitutional and additional legacies liable to the incidents of the original.</p> <p>424. The right to sue for a legacy.</p> <p>425. Interest on money legacies.</p> <p>426. Interest on advancements.</p> <p>427. Interest on legacies which are charged upon land.</p> <p>428. Interest on legacies in lieu of dower and for support of minors.</p> <p>429. The testator must stand <i>in loco parentis</i>.</p> <p>430. Money in which a legacy is payable.</p> <p>431. To whom legacies are properly payable.</p> <p>432. Apportionment of income between life tenant and remainderman when conversion is directed.</p> <p>433. Apportionment of income between life tenant and remainderman when no direction for conversion.</p> <p>434. When successive takers of personalty shall enjoy in specie.</p> <p>435. The right to premiums on securities as between life tenant and remainderman.</p> <p>436. What may be deducted from the income to be paid the life tenant.</p> <p>436a. Security by tenant for life.</p> |
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§ 405. **General legacies defined and distinguished from specific legacies.**—A general legacy is one which is to be satisfied out of the general real or personal estate of the testator owned by him at his death, and not by the delivery of any particular thing, or by payment out of any particular fund owned at the execution of the will, as distinct from all others. Whether a legacy is general or specific depends upon the intention of the testator as evidenced from the whole will. A general legacy need not necessarily be stated in money. A legacy of one or more articles of tangible personal property, as of "a horse," or of "two pictures or two pieces of furniture," is a general legacy, and is equivalent to a legacy of the value of the article or articles mentioned. So, too, a legacy of a sum of money to be invested by the executor in mortgages, stocks and bonds, or other securities, for the benefit of the legatee, or to purchase for him an article of personal use or adornment, is a general legacy.¹

A sum of money given as a legacy to A. *for a particular purpose is a general legacy*, though it may lapse if the purpose is not attainable. Thus a legacy to A., to enable him to obtain a professional education, is a general legacy, for which the general personal estate is liable, though it is intended to be applied for a specific purpose exclusively. It will lapse if the accomplishment of the purpose is impossible, or has been rendered unnecessary by the fact that the legatee has been educated in the life-time of the testator. A legacy of *all* the personal property, or of *all* the money in "*my hands or due me*,"² or of "*all my personal property*" not otherwise disposed of,³ is a general legacy.⁴ The word "*all*," by its generality,

¹ Harper v. Bibb, 47 Ala. 547; In re Van Vliet, 86 Iowa, 413, 53 N. W. R. 277; Gilmer v. Gilmer, 42 Md. 9; Parker's Ex'rs v. Moore, 25 N. J. Eq. (1873), 228; Moore v. Moore, 50 N. J. Eq. 554, 25 Atl. R. 403; Roquet v. Eldridge, 118 Ind. 147; Scofield v. Adams, 12 Hun (1878), 366; Enders v. Enders, 2 Barb. 362 (N. Y., 1848); Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. R. 238; Evans v. Hunter, 5 Misc. (N. Y.) R. 169; Apreece v. Apreece, 1 Vea. & Bea. 364; Creed v. Creed, 11 Cl. & Fin. 508, 510; Ed-

wards v. Hall, 11 Hara, 23; Cowherd v. Kitchen, 77 N. W. R. 1107. A legacy of a sum equivalent to the amount of certain securities which are owned by the testator at the date of the will, and of another sum payable out of a debt when it is collected, is general and not specific. Glover v. Glover, 33 N. E. R. 335, 136 N. Y. 635.

² Fows' Estate, 12 Pa. Co. Ct. R. 133.

³ Fielding v. Preston, 1 De Gex & Jo. 438.

⁴ A bequest of the income of two

shows this; for, though it may apply to all the personal property owned by the testator at the date of the execution of the will, it is equally applicable to everything he subsequently acquires and owns at his death. The leaning of the court is to construe legacies as general and not as specific. The very essence of a specific legacy is absent in the above example, as the testator *does not give articles specifically which may be readily identified as owned by him at the execution of his will*; nor does a specific legacy ever include articles subsequently acquired, as would the language under consideration.¹ A legacy of *all the* personal property is no less general because the testator gives a specific legacy out of it, or excepts certain specific things from it,² or because he enumerates special articles after or in connection with this general disposition of his property.³

§ 406. Demonstrative legacies—Their nature and when they abate.—"A demonstrative legacy," says Lord Thurlow,⁴ "is one which is in its nature a general legacy, but where a particular fund is pointed out to satisfy it." It assimilates to a general legacy so far as it is *not adeemed* in case the testator parts with the fund or property out of which it is payable;⁵ for, if this has been alienated, lost or destroyed by the testator, the demonstrative legacy will be paid out of the general personal estate or out of any fund which is charged with the payment of general legacies. On the other hand, if the fund out of which it is to be paid still exists at the death of the testator, the legacy is primarily payable out of it, and it then partakes of the character of a specific legacy, inasmuch that it will not abate with the general legacies upon a deficiency of general

mortgages during life, and a legacy of the same amount as the mortgages after the death of the life tenant, not expressly payable out of the mortgages, is a general legacy. *Teel v. Hilton* (R. L., 1899), 42 Atl. R. 1111.

¹ *In re Woodward*, 31 Cal. (1867), 595, 603; *Smith v. Lampton*, 8 Dana (38 Ky., 1839), 70; *Briggs v. Hosford*, 22 Pick. (39 Mass.) 288; *Davis v. Caines*, 1 Ired. (36 N. C., 1841), Eq. 309; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 436; *Parrott v. Warsford*, 1 D. &

W. 595; *Blake v. Wallscourt*, 1 Ball & B. 313; *Chapman v. Chapman*, L. R. 4 Ch. D. 800; *French v. Chichester*, 2 Vern. 568; *Clifton v. Burt*, 1 P. W. 679; *Chester v. Painter*, 2 P. W. 336.

² *Robertson v. Broadbent*, L. R. 8 App. Cas. 813, 817; *In re Ovey*, L. R. 20 Ch. D. 676, 31 id. 113.

³ *Fairer v. Park*, L. R. 3 Ch. D. 309.

⁴ *Ashburner v. MacGuire* (1780), 2 Bro. C. C. 108.

⁵ *Post*, § 410 et seq.

assets.¹ The importance of determining whether a legacy is demonstrative, general or specific will be seen at a glance. But to distinguish these classes of legacies one from the other is often a matter of extreme difficulty. Little assistance is to be derived from the cases. The matter is one wholly of intention; and in this, as in all cases, the intention is to be ascertained from the whole will, viewed in the light of the circumstances of the testator and of his property. Some inferences may sometimes be drawn from the particular formula employed by the testator. And if the will shows that the testator intends the legacy *to be paid at all events*, though a particular fund is provided for its payment, it is a demonstrative legacy, and will be paid with the general legacies where the particular fund has failed. So, where the will is silent, it may always be presumed that the testator intended to make a fair and equitable distribution of his property; and if a legacy which is payable out of a particular fund was to a relation of the testator, the courts will lean to a construction which will make it demonstrative rather than specific. Thus, a legacy of the interest on the purchase-money of an estate sold by the testator,² or of the interest on a bond and mortgage owned by him,³ or the interest

¹ *Gilmer v. Gilmer*, 42 Ala. 9; *Shaffer's Succession* (La. Ann.), 23 S. R. 739; *Gelbach v. Shively*, 67 Md. 498 (1887), 10 Atl. R. 247; *Bradford v. Bradford*, 145 Mass. 81 (1887), 13 N. E. R. 1; *Wilcox v. Wilcox*, 13 Allen (95 Mass.), 256; *Snow v. Foley*, 119 Mass. 102; *Wallace v. Wallace*, 23 N. H. 154 (3 Fost., 1851); *Pierrepoint v. Edwards*, 25 N. Y. 128, 129; *Giddings v. Seward*, 16 N. Y. (1862), 365; *Pease's Estate*, 43 N. Y. S. 1146; *Manice v. Manice*, 1 Lans. (N. Y. Sup., 1869), 348; *Enders v. Enders*, 2 Barb. (N. Y., 1848), 362; *Methodist Church v. Hubbard*, 51 N. Y. S. 546; *Johnson v. Conover*, 54 N. J. Eq. 333, 339, 35 Atl. R. 291; *Glass v. Dunn*, 17 Ohio St. (1867), 413; *Gallagher v. Gallagher*, 6 Watts (Pa., 1837), 473; *Armstrong's Appeal*, 63 Pa. St. 312; *Knecht's Appeal*, 71 Pa. St. 333; *In re Lewis*, 17 R. I. 642; *Corbin v. Mills*, 19 Gratt. (Va., 1869), 438; *Meyers v. Meyers*, 88 Va. 413, 424, 13 S. E. R. 346; *Morris v. Garland*, 78 Va. 223; *Hibler v. Hibler*, 104 Mich. 274, 277, 63 N. W. R. 361; *Byrne v. Hume*, 84 Mich. 185, 86 Mich. 546, 49 N. W. R. 546; *Vickers v. Pound*, 6 W. R. 580, 4 Jur. (N. S.) 543; *Mullins v. Smith*, 1 Dr. & Sm. 210; *Paget v. Huish*, 1 H. & M. 663; *Saville v. Black*, 1 P. W. 778; *Fowler v. Willoughby*, 2 Sim. & St. 354, 358; *Creed v. Creed*, 11 Cl. & Fin. 508; *Livesay v. Redfern*, 2 Y. & Col. 90; *Bevan v. Attorney-General*, 4 Giff. 361; *Disney v. Cross*, L. R. 2 Eq. 293; 2 Williams, Ex'rs, § 1252; 3 Pom. Eq. Jur., § 1133; 2 Redf., § 187.

² *Corbin v. Mills*, 19 Gratt. (Va.) 438, 475.

³ *Johnson v. Conover*, 54 N. J. Eq. 333, 339; *Giddings v. Seward*, 16 N. Y. 365.

on his government securities,¹ is demonstrative. But the interest on "*my money invested in the funds*" is a specific legacy.²

§ 407. **Specific legacies defined — Money legacies, when specific.**—A specific legacy is a gift of a particular thing or of money, specified and distinguished from all things, and which, at the execution of the will, is owned by the testator, as of a horse, or a piece of plate, or of money in a purse, stocks of a corporation, and the like.³ The tendency of the courts is to refuse to construe legacies as specific. The intention to make them specific must either appear by express words or by strong inference from a rational construction of the whole will. It cannot be shown by evidence of the declarations of the testator.⁴ And the person who claims the legacy is specific has the burden of proof to establish the existence of the thing bequeathed, and its identity with the words of the will,⁵ which he may, and must of necessity, do by parol.⁶

A legacy of a sum of money in a bag,⁷ or in a chest or on deposit in a bank,⁸ or in a trunk or a safe-deposit vault at the date of the execution of a will, is specific, and is adeemed by its subsequent removal by the testator.⁹

¹ Mytton v. Mytton, L. R. 19 Eq. 80.

² Pratt v. Pratt, L. R. (1894), Ch. 491; Page v. Young, L. R. 19 Eq. 501. See also § 409. Consult the following cases upon the question whether a legacy is or is not demonstrative: Roberts v. Pocock, 4 Ves. 150; Jones v. Southall, 32 Beav. 81; Colville v. Middleton, 3 Beav. 570; Williams v. Hughes, 24 Beav. 474; Dickin v. Edwards, 4 Hare, 273; Mann v. Copland, 2 Mad. 223; Sidebotham v. Watson, 11 Hare, 170; Disney v. Cross, L. R. 2 Eq. 293; Fream v. Dowling, L. R. 4 Eq. 145, 20 Beav. 631.

³ 1 Roper, Leg., § 191. See also Cagney v. O'Brien, 83 Ill. (1876), 72; Bradford v. Haynes, 20 Ma. 105, 107; Walton v. Walton, 7 Johns. Ch. (N. Y., 1823), 258; Byrne v. Hume, 84 Mich. 185; Snyder v. Boyer, 10 Watts (Pa., 1840), 54; Cogdell v. Cogdell, 3 Des. (S. C., 1811), 346, 373; Hinton v. Pinkie, 1 P. Wms. 539; Bothamley v. Sherson, L. R. 20 Eq. 308, 309.

⁴ Wyckoff v. Perrine, 37 N. J. Eq. 120, 121; Metcalfe v. Bank, 128 Mass. 370, 373.

⁵ Barber v. Davidson, 73 Ill. App. 441.

⁶ In re Hastings, 6 Dem. Sur. (N. Y.) 307; Boys v. Williams, 2 Russ. & My. 689.

⁷ Lawson v. Stitch, 1 Atk. 507, 508.

⁸ Smith v. McKittrick, 51 Iowa (1879), 548; Barber v. Davidson, 73 Ill. App. (1897), 441; Cagney v. O'Brien, 83 Ill. 72; Towle v. Swasey, 106 Mass. 100; Snow v. Moore, 107 Mass. (1871), 510; Beck v. McGillis, 9 Barb. (N. Y.) 85; Pell's Estate, 8 Pa. Co. Ct. R. 45; Hinton v. Pinkie, 1 P. W. 540.

⁹ Kelly v. Richardson, 100 Ala. 584, 13 S. R. 785. See also § 316. A legacy of money "now on deposit in a certain bank," which may be on hand and not otherwise disposed of, is specific, but is not adeemed by being drawn out of that bank and deposited in another. Prendergast v. Walsh (N. J. Eq., 1899), 42 Atl. R. 1049.

§ 408. Specific legacies of stocks, debts and securities.—

A legacy of shares in a corporation or of similar securities is specific where the will clearly shows an intention upon the part of the testator to give a specific description of stock as distinct from all other stock of the same kind, whether he, in describing it, employs words naming it alone, or whether he also employs words of amount. Thus, a gift of all "*my stock in the A. company*,"¹ "*all my mill stock and bank stock*,"² of a fixed sum of stock "*standing in my name*,"³ "*all the stock which I have*,"⁴ or all the stock in the A. company "*which the testator may possess at his death*,"⁵ is specific.

A legacy of stock, whether given in general terms or given as so many shares of the particular stock, is a general legacy wherever the testator does not expressly refer to it as being "in his possession" or "owned by him" at the date of the execution of the will. Appropriate language indicating ownership or possession would be "my stock," or "stock owned by me," or "in my

¹ *Miller v. Little*, 2 Beav. 259; *Measure v. Carleton*, 30 Beav. 538; *Johnson v. Goss*, 128 Mass. 433.

² *Tomlinson v. Bury*, 145 Mass. 346, 347.

³ *Washington Asylum v. Corporation*, 7 D. C. 259; *Gordon v. Duff*, 28 Beav. 519, 3 De Gex, Fisher & J. 662; *Norris v. Thompson*, 16 N. J. Eq. (1868), 218, 222; *Moore v. Moore*, 50 N. J. Eq. 554, 561, 25 Atl. R. 403; *Tomlinson v. Bury*, 145 Mass. (1887), 346, 347, 14 N. E. R. 137. See also *Kermode v. MacDonald*, L. R. 1 Eq. 457, 3 Ch. 584; *Miller v. Little*, 2 Beav. 259; *Choat v. Yeats*, 1 Jac. & Wal. 103; *Mallins v. Smith*, 1 Drew. & Sm. 210; *Oliver v. Oliver*, L. R. 11 Eq. 506; *Barton v. Cooke*, 5 Ves. 46.

⁴ *Cockran v. Cockran*, 14 Sim. 343. The nature, condition and species of property owned by the testator, either at the date of the execution of the will, or at his death, can usually be proved only by evidence extrinsic to the will. Such evidence is, therefore, admissible to show whether a particular legacy is specific, general

or demonstrative; and, if the first, whether it has been adeemed. It may be shown by parol that the testator, who has given a legacy of a certain number of shares in a corporation or of stock standing in his name, at the execution of the will owned stock which exactly corresponds with the number of shares mentioned, and also that he has or has not sold the shares before his death. *Warren v. Postlethwaite*, 2 Col. 116, 121; *Horwood v. Griffith*, 4 De Gex, Mac. & G. 700; *Boys v. Williams*, 2 R. & My. 689, 690. If a legacy is demonstrative, and it appears by parol that the testator has parted with the particular fund charged with its payment, it may be shown that he owned the fund at the date of the execution of his will and also under what circumstances he parted with it. *Lindgren v. Lindgren*, 9 Beav. 858, 363; *Stilwood v. Mildmay*, 3 Ves. 306.

⁵ *Fontaine v. Tyler*, 9 Price, 84; *College v. Sutton*, 12 Sim. 521; *Stephenson v. Dawson*, 3 Beav. 342.

name," and the like. And the mere fact that at the date of the will it appeared that he did own stock and securities of the character bequeathed equal to or greater in value than those devised will not *alone* make the legacy specific unless the testator shall refer to the identical securities in his possession. And if, in such case, he parts with the securities owned by him, it will be presumed, in the absence of any indication of a contrary intention, that he intended his executors should purchase securities of the sort mentioned for the legatee out of the general personal estate.¹

The presumption that a legacy of stock is general may be rebutted by the context. Thus, where the testator bequeathed "ten shares of the stock of the A. Co.," and subsequently gave the "*balance of the above stock as per my stock book*,"² or the balance of stock "*standing in my name*;"³ or where the will bequeathing stock generally directs the executor, in case the testator shall not have sufficient stock *standing in "his" name*, *then* to make good the deficiency,⁴ the first legacy is specific. A gift of a portion of the shares of stock owned by the testator, or of "stock out of stock," is a specific legacy which is subject to ademption.⁵ But a legacy of money directed to be paid out of stock, as of "\$1,000 out of *my* shares of *A. stock*," is a demonstrative legacy, which will be payable out of the personal estate in case the stock mentioned is not owned by the testator at his death, and the legacy will abate with the general legacies.⁶

§ 409. Incidents of specific legacies — Right to interest and dividends on securities specifically bequeathed.— A specific legacy of securities, as of shares, notes or bonds, carries with

¹ Robinson v. Addison, 2 Beav. 414; Simmons v. Vallance, 4 Bro. C. C. 345; Bishop v. Mortlock, 1 id. 565; Webster v. Hale, 8 Ves. 410, 413; Sibley v. Perry, 7 Ves. 522, 523, 529, 530; Wilson v. Brownsmith, 9 Ves. 180; Sleech v. Torrington, 2 Ves. 562, 563; Hayes v. Hayes, 1 Kee. 97; Johnson v. Johnson, 14 Sim. 813; Purse v. Samplin, 1 Atk. 415. But where, after stock is given generally by a will, a sale of it is directed for the benefit of the legatee, it will be a specific legacy. Ashton v. Ashton, 3 P. W. 384.

² Trustees v. Tufts (Mass.), 23 N. E. R. 1006.

³ Simmons v. Vallance, 2 Ves. 560, 563; Millard v. Bailey, L. R. 1 Eq. 378.

⁴ Townsend v. Martin, 7 Hare, 471; Queen's College v. Sutton, 12 Sim. 521.

⁵ Morley v. Bird, 3 Ves. 629; Hosking v. Nicholls, 1 Y. & C. 478.

⁶ Kirby v. Potter, 4 Ves. 748, 750, 752; In re Pease, 43 N. Y. S. 1146. A clause bequeathing to a legatee "one thousand dollars either in stocks or money" entitles the legatee to elect,

it all accessions to it, or incidents of it, which have been created prior to the death of the testator. A legacy of a bond¹ or of a note² carries with it, in the absence of statute requiring apportionment, all the interest which has accrued to the death of the testator. And if the right to the specific thing bequeathed vests in the legatee at the death of the testator, the legatee will also be entitled to all interest which may subsequently accrue *from that date*, and not, as in the case of a general legacy, from one year after the death of the testator.³

The specific legatee of shares of stock is entitled to all dividends which have accrued down to the death of the testator⁴ as well as to those which subsequently accrue. But the contrary is the case where the legacy of stock is general, as, *a. g.*, where the testator gives a sum precisely stated which is in stock, or which is to be invested in securities, in which case the legatee is *not* entitled to dividends accruing thereon before he receives the same from the executor.⁵

A specific legacy of corporation shares, while it includes *dividends*, does not include a *bonus*, whether in money or in shares, which may have been declared *prior to the death of the testator*, but which has not been paid to him or transferred to his name.⁶ And, of course, any *bonus* declared *after* the death of the testator, upon shares specifically given, belongs to the legatee.⁷ The profits of a business in which the testator was

and if he elects to take stocks he is entitled to \$1,000 worth of stocks at their market value. *Graham v. De Yampert*, 106 Ala. 279, 17 S. R. 355.

¹ *Harcourt v. Morgan*, 2 Keen, 274.

² *Perry v. Maxwell*, 2 Dev. Eq. (17 N. C., 1833), 487; *In re Mowry*, 16 R. I. 514, 17 Atl. R. 553; *Fleming v. Carr*, 47 N. J. Eq. 549, 22 Atl. R. 197; *Ogden v. Pattee*, 149 Mass. 82 (1889), 21 N. E. R. 227.

³ *Smith v. McKitterick*, 51 Iowa (1879), 548, 550; *Graybill v. Warren*, 4 Ga. (1848), 528; *Blundell v. Pope* (N. J. Eq.), 21 Atl. R. 456; *Raven v. Waite*, 1 Sw. 557. *Cf. post*, § 425 et seq.

⁴ *Barrington v. Tristram*, 6 Ves. 845, 849; *Clive v. Clive*, Kay, 600;

Bristow v. Bristow, 5 Beav. 289; *Washington Asylum v. Corporation*, 7 D. C. 259; *White v. Jones* (Ga., 1898), 31 S. E. R. 119; *In re De Hastings*, 6 Dem. Sur. (N. Y.) 307.

⁵ *In re Hodgman's Estate*, 140 N. Y. 221, 35 N. E. R. 660, 69 Hun, 484; *Dorsey v. Dorsey*, 4 Harr. & McH. (Md., 1798), 231.

⁶ *Lock v. Venables*, 27 Beav. 598; *De Gendre v. Kent*, L. R. 4 Eq. 283; *Fidelity Co.'s Appeal*, 108 Pa. St. 339, 492. A gift of an insurance policy upon the life of the testator will carry a *bonus* declared thereon during his life, but payable only upon his death. *Roberts v. Edwards*, 83 Beav. 259.

See *Norris v. Harrison*, 2 Madd. 268.

⁷ *Edmondson v. Crosthwaite*, 84

a partner, which had accrued during a period which at his death had wholly expired, though they had not been paid, are a part of the general personal estate, and go to the executor, and not to a specific legatee of the testator's share in the partnership.¹

A specific legacy ought to be delivered to the legatee at the expiration of one year from the death of the testator. If, therefore, the executors, fearing a deficiency of assets, retain the articles specifically devised longer than a year, and during this time the value of the specific legacy has depreciated, the legatee has a right to claim compensation for his loss out of the general estate.²

§ 410. The ademption of specific legacies — Ademption by removal.— The rule of the ademption of specific legacies usually operates independently of an express intention to that effect upon the part of the testator. The question is, Was the legacy specific? Did the testator intend to give a particular thing as distinct from everything else? If these questions are answered in the affirmative, and the thing which has been given, and which the testator owned at the execution of his will, is, at his death, no longer in his possession or ownership, the legacy is, *ex necessitate rei*, adeemed, for there is nothing upon which the words of the will can operate. It is then immaterial whether the testator actually intended this or not.

A specific legacy of money or of goods described as being in a certain place will be adeemed by their removal by the testator during his life-time,³ if the removal is permanent.⁴ An accidental removal, or one which is intended to be temporary or conditional only, will not be an ademption. This has been so held where plate and furniture, described as being in a city residence when bequeathed, were removed from it to a coun-

Beav. 30; Carron v. Hunter, 1 H. L. Cases, 263; Maclaren v. Stainton, 3 De Gex, F. & Jo. 202.

¹ Browne v. Collins, L. R. 12 Eq. 586, 593; Ibbotson v. Elam, L. R. 1 Eq. 188; Gow v. Forster, W. N., May 17, 1884, p. 122.

² Chaworth v. Beech, 4 Ves. 555, 563; Morley v. Bird, 3 Ves. 629.

³ Green v. Symonds, 1 Bro. C. C. 129; Blagrove v. Coore, 27 Beav. 188; Colleton v. Garth, 6 Sim. 19; Bell's Estate, 8 Pa. Co. Ct. R. 454.

⁴ Heseltine v. Heseltine, 3 Mad. 276, 277; Pellew v. Horsford, 2 Jur. (N. S.) 513; Spencer v. Spencer, 21 Beav. 548, 549; Turner v. Turner, 28 W. R. 859; *ante*, § 316.

try house¹ for the *use of the family of the testator*; or where plate and jewelry were taken to a banker's office *for safe deposit*;² or where articles which had been bequeathed were *wrongfully removed to disappoint the legatee*, and, *a fortiori*, without the knowledge or consent of the testator.³

§ 411. *The animus adimendi.*—The alteration in the character of the subject-matter of a specific legacy must have been effected or authorized by the testator himself, or it will not operate as an ademption.⁴ If it is accomplished by another it will not effect an ademption of the legacy, if the property in its new form is in the possession of the testator at his death, unless he shall subsequently ratify the alteration brought about. The principles of equitable conversion elsewhere discussed⁵ are applied here; hence, though shares or other securities may have been sold and the proceeds invested in others of an entirely different character, the law will disregard the actual conversion if it was made without the consent or choice of the testator, will treat the new property as identical with the old, and it will pass to the specific legatee of the latter.⁶ This rule will be applied to the case of a testator who, subsequently to the execution of the will, becomes *non compos mentis*, and the securities which he had specifically disposed of in his will are transferred to the name of his committee.⁷ On the other hand, if shares or other property belonging to an incompetent person are sold by order of the court, and the proceeds are expended for the benefit of the incompetent, a specific legatee cannot call upon the personal estate to make good his legacy, for it has been adeemed.⁸

¹ *Land v. Devaynes*, 4 Bro. C. C. 536, 537.

² *Cockerell v. Earl of Essex*, L. R. 26 Ch. D. 538, 551; *Domville v. Baker*, 32 Beav. 604.

³ *Shaftsbury v. Shaftsbury*, 2 Vern. 747, 748, note 2; *Taylor v. Taylor*, 10 Hare, 473; *Jenkins v. Jones*, L. R. 2 Eq. 323.

⁴ *Ante*, § 410.

⁵ See § 695 et seq.

⁶ *Bason v. Brandon*, 8 Sim. 171.

⁷ *In re Wood*, 8 Reports (1894), 817,

2 Ch. 577; *Taylor v. Taylor*, 10 Hare, 475; *Jenkins v. Jones*, L. R. 2 Eq. 323.

⁸ *Jones v. Green*, L. R. 5 Eq. 555; *In re Freer*, L. R. 22 Ch. D. 632. But where the language of the will clearly points to property as it may exist at the date of the death of the testator, and he subsequently becomes *non compos mentis*, and large sums of money which are subsequently paid into the hands of his committee are by the latter invested in securities, they will not pass under a gift of

§ 412. **Specific legacies of animals and other personal chattels.**—A legacy of “*my*” watch, “*my*” horse named Castor,¹ of all *my* cows,² “*my*” mules, horses, farming implements and furniture,”³ “*my* store and its contents,”⁴ as many of “*my* horses” as will amount to a sum stated,⁵ all the books in “*my* chambers,”⁶ “*my* stock in trade,”⁷ and generally all legacies of tangible articles described as in the possession of or owned by the testator, are specific legacies.⁸ Where a legacy of animals is specific, it is adeemed if they die during the lifetime of the testator, though he may own others of the same species at his death. But a legacy of *a horse* or *a cow*, *simpliciter*, is general, not specific, and will be delivered if the testator owns any of the species at his death.

§ 413. **The ademption of legacies of debts and stock by payment and transfer.**—Where the testator bequeaths a debt due him at the execution of the will and subsequently it is paid, the legacy is adeemed. The distinction made by many of the early cases between the extinguishment of the debt by the testator by a demand or by a suit, and obtaining a judgment, and by a voluntary payment by the debtor, holding that in the former case it was adeemed and in the latter it was not, no longer exists.⁹

The presumption of any intention upon the part of the testator either to keep the legacy alive, or the reverse, is no longer recognized. Whenever the debt is discharged during the life of the testator in any manner the legacy is adeemed.¹⁰ And the

“all ready money and bank notes about his person, or in or at his usual residence.” *Browne v. Groombridge*, 4 Madd. 495.

¹ *Shep. Touch*, 433.

² *Brady v. Brady*, 78 Md. 461, 28 Atl. R. 515; *Stall v. Wilder*, 77 N. Y. 153.

³ *McFadden v. Hefley*, 28 S. C. 317, 5 S. E. R. 812; *Spencer v. Higgins*, 23 Conn. 521.

⁴ *Kelly v. Richardson*, 100 Ala. 584, 13 S. R. 785.

⁵ *Richards v. Richards*, 9 Price, 219.

⁶ *Green v. Symonds*, 1 Bro. C. C. 129.

⁷ *Stewart v. Denton*, 4 Doug. (Eng.) 219.

⁸ *Lilly v. Curry*, 6 Bush (Ky.), 590;

Golder v. Littlejohn, 30 Wis. 344; *McGuire v. Evans*, 5 Ired. (N. C.) Eq. 269.

⁹ *Attorney-General v. Parkin*, Amb. 566; *Lord Thomand v. Suffolk*, 1 P. Wms. 461.

¹⁰ *Rider v. Wager*, 2 P. W. 329, 331; *Innes v. Johnson*, 4 Ves. 568, 574; *Birch v. Baker*, Mos. 473; *Aston v. Wood*, 43 L. J. Ch. 715; *Harrison v. Jackson*, L. R. 7 Ch. D. 339; *Spencer v. Higgins*, 22 Conn. (1853), 521; *Whitlock v. Vaun*, 38 Ga. (1868), 562; *Wheeler v. Wood*, 104 Mich. 414, 62 N. W. R. 577; *Ford v. Ford*, 23 N. H. 212; *Hayes v. Hayes*, 45 N. J. Eq. 461 (1889); *Newcombe v. Church*, 2 Sandf.

partial payment or discharge of the debt will effect an ademption *pro tanto*.¹ A legacy of a debt will not, when the legacy has been adeemed by the payment of the debt, be revived by the re-investment of the money in another security, though of a precisely similar character.² Thus, a legacy of a debt to the debtor, which is subsequently adeemed by the latter paying the debt, is not revived by his incurring a new debt to the testator which is unpaid at the death of the testator.³ But a legacy of notes is not adeemed because they are delivered to the promisor and new notes are taken for them, where the only reason of the change is to make the debt more secure, and the new notes are substantially the same as the old.⁴ Shares of stock or other securities specifically bequeathed by the testator, and subsequently sold and transferred by him wholly or in part, are adeemed *ipso facto* wholly or *pro tanto*.⁵ So, also, where the testator, after bequeathing his shares, exercises an option and has them converted into another species of security in the same corporation,⁶ or where the shares when bequeathed are standing in the names of trustees for the benefit of the testator, and they are paid off subsequently and the money is re-invested in the names of other trustees.⁷

Stock specifically given, if sold by the testator, is absolutely adeemed, and the fact that the testator afterwards purchases the same or a less number of shares of the same stock will not revive the bequest.⁸

On the other hand, as the principle of ademption is based upon the fact that the article specifically given has been wholly

(N. Y., 1845), Ch. 636; *Blackstone v. Schaffer's Succession* (La., 1898), *Blackstone*, 3 *Watts* (Pa., 1837), 335; 23 S. R. 739.

¹ *Alsop's Appeal*, 9 Pa. St. 374; *McMahon's Appeal*, 182 Pa. St. 175, 19 Atl. R. 68; *Cuthbert v. Cuthbert*, 3 Yeates (Pa., 1802), 496; *Doughty v. Stillwell*, 1 Bradf. (N. Y.) 300; *Stout v. Hart*, 6 N. J. Eq. (1847), 414, 418.

² *Jones v. Southall*, 32 Beav. 81; *Makeown v. Ardagh*, 10 Ir. Eq. 445.

³ *Phillips v. Hatton*, 17 Beav. 494; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258.

⁴ *Smallman v. Goolden*, L. R. 17 Eq. 67.

⁵ *Ashburner v. McGuire* (1784), 2 Bro. C. C. 184; 2 *White & Tudor's L. C.* 250; *Sleech v. Torrington*, 2 Ves. 560; *Lee v. Lee*, 27 L. J. Ch. 824.

⁶ *In re Lane, Luard v. Luard*, 14 Ch. D. 856.

⁷ *Harrison v. Jackson*, L. R. 7 Ch. D. 339.

⁸ *In re Gibson*, L. R. 2 Eq. 669; *Harrison v. Jackson*, L. R. 7 Ch. D. 339.

parted with by the testator *animo adimendi*, no ademption takes place so long as the testator retains his interest in the shares, though its form and character have been substantially altered without or against his consent.¹ Thus, a bequest of consols is not adeemed, where the testator became *non compos mentis*, by their transfer to a committee under the order in lunacy,² nor by their transfer from the names of trustees to the name of the testator,³ nor where shares in a corporation are by the corporation, acting under statutory authority, converted into other stock of the same company though of a different character.⁴

§ 414. Legacies of debts and securities are specific—**Ademption by payment.**—A legacy of a debt which at the date of execution is due the testator is specific and is adeemed by its subsequent discharge.⁵ Thus, a gift of my bonds,⁶ or of a specifically described mortgage,⁷ or of the money *now owing me by A.*, or due from A.,⁸ or of money due on A.'s bond,⁹ or of my note,¹⁰ or all *my* notes,¹¹ is a specific legacy; and if, during his life-time, it is paid to the testator, the legatee cannot call for its payment out of the personal estate. The same principles apply to a legacy of a part of a debt,¹² with the inclusion of the balance in the residuary clause; and also where a debt is bequeathed to several as tenants in common or to take in succession.¹³

There is this distinction between a specific and a demonstrative legacy as respects a debt out of which it is to be paid. If

¹ Lee v. Lee, 27 L. J. Ch. 824; Oakes v. Oakes, 9 Hare, 666.

² In re Wood, 8 Report, 817 (1894), 2 Ch. 577.

³ Dingwell v. Askew, 1 Cox, 427.

⁴ Oakes v. Oakes, 9 Hare, 666. But compare In re Lane, Luard v. Luard; L. R. 14 Ch. 856. Compare cases cited ante, §§ 410, 411.

⁵ Ante, § 413.

⁶ Sleaf v. Torrington, 2 Ves. 560, 562, 563; Hood v. Haden, 82 Va. 588.

⁷ McMahon's Appeal, 182 Pa. St. 175, 19 Atl. R. 68; Wheeler v. Wood, 104 Mich. 414, 62 N. W. R. 577; Humphrey v. Robinson, 52 Hun, 200, 5 N. Y. S. 164.

⁸ Hayes v. Hayes, 45 N. J. Eq. 461 (1889), 17 Atl. R. 634; Ellis v. Walker, Amb. 309.

⁹ Davies v. Morgan, 1 Beav. 405.

¹⁰ Drinkwater v. Falconer, 3 Bro. C. C. 160; Batchelor's Succession, 19 S. R. 283, 48 La. Ann. 278; Tolman v. Tolman, 85 Me. 317 (1892), 27 Atl. R. 184.

¹¹ Ford v. Ford, 23 N. J. Eq. 212.

¹² Infirmary v. Wallace, 37 Fed. R. 750; Ford v. Fleming, 1 Eq. Cases, 302; Nelson v. Carter, 5 Sim. 530.

¹³ Ashburner v. McGuire (1784), 2 Bro. C. C. 108; Inness v. Johnson, 4 Ves. 568; Stanley v. Potter, 2 Cox, 180.

the testator gives a part of the debt itself *to be selected*, either by the executor or the legatee, as so many dollars in mortgages or invested in securities, or the like, it is a specific legacy.¹ But where he gives the legatee a particular sum which is to be paid out of the debt which is due him, it is a demonstrative legacy,² and is payable out of the personal estate if the testator has parted with the fund which was to be primarily liable.³

§ 415. Ademption of land specifically devised — Partial modification of interest.— The act of the testator in conveying or mortgaging lands devised is by some authorities termed a revocation of the will. It would seem more appropriate to treat it under the head of ademption, for by no stretch of the imagination or fiction of law can it be supposed that an intention to revoke is present, without which no action of a testator can correctly be termed a revocation. A testator who, after the execution of a will, aliens by sale, pledge or mortgage any of the personal or real property included in it, rarely, if ever, has the will in his mind, and, if asked if he intended to revoke it, would vehemently deny the existence of that intention. That his action is equivalent in its result to a revocation, partial or complete, gives us no greater right to term it such than we have to call his acquiescence in a will, invalidly executed, a re-execution and validation of the will.⁴

¹ *Pratt v. Pratt*, 8 Rep. 801 (1894), 1 Ch. 491; *Blundell v. Pope* (N. J.), 21 Atl. R. 456.

² *Ante*, § 406.

³ *Duncan v. Duncan*, 27 Beav. 386; *Sparrow v. Josselyn*, 16 Beav. 135; *In re Tyler* ("the sum of \$— in five per cent. stock"), 65 L. T. 367; *Frank v. Frank*, 33 N. W. R. 153, 71 Iowa, 646, 647. Compare *Johnson v. Johnson*, 48 S. C. 408, 410, 26 S. E. R. 722. A legacy of \$10,000 "payable in cash, stocks, bonds or notes, which the testator may leave at his death" (*Martin v. Osborne*, 1 Pickle (Tenn.), 420, 3 S. W. R. 647), or of stated sums in stocks and bonds, with no direction to select them out of the estate (*Blundell v. Pope* (N. J. Eq.), 21 Atl. R. 456), is a general or rather a demonstrative legacy. A bequest of an insurance

policy of which the testator is a beneficiary will be adeemed if the person insured shall die during the life-time of the testator, and he shall receive the money due thereon. *Barker v. Rayner*, 5 Madd. 208, 2 Russ. 122. A legacy to the son of such an amount as should be paid on the son's note held by the testator is not adeemed by a subsequent surrender of the note, but, being a demonstrative legacy, the son should be paid a sum equal to its amount. *In re Lewis*, 17 R. I. 642, 24 Atl. R. 146.

⁴ By statute it is provided that the entering into a contract for the sale of land is not a revocation of the will as to that land, unless all the purchase-money shall have been paid. *Slaughter v. Stevens*, 81 Ala. 48, 2 S. R. 144.

Every devise of real property, though it may be included in a residuary clause, except land acquired after the execution of the will, is of necessity specific, and it is, with equal necessity, adeemed if the testator has parted with the land before the will has, by his death, become operative upon it. If he part with his entire interest in it by conveyance it is a complete ademption; while, if he part with only a portion of his interest, as by a mortgage or a conveyance in trust, it is an ademption *pro tanto* only.¹ Thus, where the testator leases land subsequent to devising it, the leasing is an ademption *pro tanto* only, and the devisee takes the land subject to the lease and all its obligations.² As a result growing out of the rule that a devise of lands prior to the enactment of the Victorian statute of wills operated only upon land the legal title to which the testator was seized of at the date of his will and also at the date of his death, the rule was that if the testator alienated the fee-simple title to land which was devised in his will, though even for a partial purpose, as for a marriage settlement or by mortgage, the whole interest devised was regarded as adeemed thereby.³

¹ Kelly v. Richardson, 100 Ala. 584, 13 S. R. 785; Henderson v. Green, 84 Iowa, 437, 439, 11 Am. R. 149; Blaney v. Blaney, 1 Cush. (55 Mass.) 350, 861; Webster v. Webster, 105 Mass. (1870), 542; Humes v. Wood, 8 Pick. (Mass.) 478; Hayes v. Jackson, 6 Mass. 149; Healey v. Toppan, 45 N. H. 243, 262; Hattersley v. Bissett, 51 N. J. Eq. 597, 29 Atl. R. 187; Carter v. Thomas, 4 Me. (1826), 341, 344; Sharp v. McPherson, 10 Ohio Cir. Ct. R. 181; Brush v. Brush, 11 Ohio (1842), 287; Coapland v. Lake, 9 Tex. Civ. App. (1896), 39, 43; Hensman v. Fryer, L. R. 3 Ch. 136; Emery v. Society, 79 Me. 334, 341, 9 Atl. R. 891. Where the statute provides that a written will can only be revoked as therein prescribed, an objection that a will offered for probate has been revoked by the conveyance of property devised will be overruled. Tillman's Estate (Cal.), 31 Pac. R. 563. In some states the statutes expressly provide that any act by the testator wholly inconsistent

with a testamentary disposition shall be regarded as a revocation. Walker v. Steers, 14 N. Y. S. 393, 60 Hun, 576; 4 R. S., p. 2549, sec. 48.

² Hodginson v. Wood, Cro. Car. 28; 1 Powell on Devises, p. 557, n. 8. A devisee of a ground rent takes it subject to a lease made after the execution of the will. Brady v. Brady, 78 Md. 461, 28 Atl. R. 515. And a specific devisee of land takes it subject to a license created by the testator. Fuller's Estate (Vt., 1899), 42 Atl. R. 981. The devisee may collect all rents accruing after the testator's death. Woodworth's Estate, 31 Cal. (1867), 595, 605; Clift v. Moses (1889), 116 N. Y. 144, 153; Wilson v. Wilson, 13 Barb. (N. Y.) 252; Schouler's Ex'rs, § 216; 2 Wms., p. 893. *Contra*, Dunbar v. Dunbar, 3 Vt. (1831), 472; Allen v. Tarbell, 26 Atl. R. 65 (1892), 65 Vt. 150. *Cf.* Wettengel v. Gormley, 160 Pa. St. 559, 28 Atl. R. 934.

³ This rule was adopted in some of the states and repudiated in others.

The fact that the testator takes a purchase-money mortgage does not prevent a sale and conveyance from being an ademption of land devised, and the mortgage thus given goes to the residuary legatee, unless specifically bequeathed.¹

§ 416. Definition and classification of repeated legacies — Cumulative and substitutional legacies defined.—Where the testator gives two or more legacies to the same person they are called cumulative; but where he gives one legacy in a will and another legacy in place of the first legacy in a codicil, the second legacy is substitutional. All cases in which a repetition of legacies occur may be divided into four classes. *First*, where the *same specific thing is given twice* to the same person; *second*, where the *same quantity or amount of money is given twice*; *third*, where *two pecuniary legacies are given* and the latter is *smaller than the former*; and *fourth*, where *two pecuniary legacies are given* and the latter is *larger than the former*.²

§ 417. Repetition of legacy of a specified thing to the same person.—If a specific thing or things are given to the same person, whether in the same instrument or in different wills, the testator is presumed to have made a mistake. The distinction is between specific legacies of the same *thing* and general legacies of the same *amount*. Thus, if the testator gives his gold watch to A. in a will, and subsequently give it to him in a codicil, of necessity it is but one legacy where the testator has but one watch. That is all the legatee can claim; and this is not only a rule of the English law, but of the Roman civil law as well.³

Brush v. Brush, 11 Ohio, 287; Hawes v. Humphrey, 9 Pick. (Mass.) 350; Floyd v. Floyd, 7 B. Mon. (46 Ky., 1847), 290; Carter v. Thomas, 4 Me. 341 (1826); Wells v. Wells, 35 Miss. 638 (1858); McNaughton v. McNaughton, 34 N. Y. 201 (1866); Woolery v. Woolery, 48 Ind. 523 (1874). If the testator shall, subsequent to the execution of the will, convey land upon trust, though it is done to avoid creditors, it is a revocation and ademption, even where the deed was not recorded until after his death. Col-

lup v. Smith, 89 Va. 253, 15 S. E. R. 584.

¹ Emery v. Society, 79 Me. 334, 341, 9 Atl. R. 891; Adams v. Winne, 7 Paige (N. Y.), 97, 102; Beck v. McGillis, 9 Barb. (N. Y.) 35.

² This classification is taken from the case of Hooley v. Hatton (1772), 1 Bro. C. C. 390, 2 Dick. 461, Lofft, 122. See also vol. 2, White v. Tudor's L. C., p. 349 et seq.

³ Dig. 1, 22, tit. 3, 1, 12; Cujacius opus t. 5, 281, 282; Hooley v. Hatton, 1 Bro. C. C. 390.

§ 418. Repetition of legacies of money — Presumption arising from gift by different instruments.— A legacy given by codicil will not, in the absence of a contrary intention, be regarded as substitutional for one given in a will; for if a man, by different testamentary instruments, give legacies to A., the legacies will be presumptively cumulative. The testator will be presumed to know what he is doing. If at different dates he had given two or more gifts *inter vivos* to A., no presumption exists that the giving of a subsequent gift would imply the return of the former. Where these gifts are contained in wills of different dates this reasoning may be invoked, whether the legacies are of the same amount,¹ or whether the latter legacy is smaller than the former; provided, always, they are contained in different instruments.² The presumption that the legacies are cumulative, arising from the fact that they are contained in different instruments, is materially strengthened by a difference between them in the mode or time of payment. The fact that legacies are payable at different dates or out of different funds,³ or that on the death of the legatee they are to go over to different persons, is material in showing that one is not given in substitution for the other.⁴ The fact that a testator in a codicil states that certain legacies therein given are to be *in addition to those in the will* is evidence that other legacies which are not stated to be in addition are cumulative.⁵

¹ *Newport v. Kynaston*, Rep. t. Finch, 294; *Wallop v. Hewett*, 2 Ch. R. 70; *Baillie v. Butterfield*, 1 Cox Ch. R. 392; *Forbes v. Lawrence*, 1 Collyer, 495; *Radburn v. Jervis*, 3 Beav. 450; *Hubbard v. Alexander*, L. R. 3 Ch. D. 738, 740; *Creveling v. Jones*, 21 N. J. L. 573, 576; *Appeal of Manifold*, 19 Atl. R. 42, 126 Pa. St. 508; *De Witt v. Yates*, 10 Johns. (N. Y.) 156; *Rice v. Boston Aid Society*, 56 N. Y. 191; *Edwards v. Rainier*, 17 Ohio St. 597.

² *Dickinson v. Overton* (N. J.), 41 Atl. R. 949; *Pitt v. Pidgeon*, 1 Ch. Cas. 301, 302; *Suisse v. Lowther*, 2 Hare, 424, 432; *Hartford v. Lowther*, 7 Beav. 107; *Hurst v. Beach*, 5 Madd. 351, 358; *Lyon v. Colville*, 1 Coll. 449; *Radburn v. Jervis*, 3 Beav. 450; *Townshend v. Mostyn*, 26 Beav. 72;

Cresswell v. Cresswell, L. R. 6 Eq. 69, 76; *Wilson v. O'Leary*, L. R. 12 Eq. 525, L. R. 7 Ch. App. 440. A pecuniary bequest given in a codicil will usually be presumed to be additional to a bequest of the residue to the same person in the will. *Gordon v. Anderson*, 4 Jur. (N. S.) 1097; *Ledger v. Hooker*, 18 Jur. 481.

³ *Creveling v. Jones*, 21 N. J. L. 573, 576.

⁴ *Hodges v. Peacock*, 3 Ves. 735, 737; *Attorney-General v. George*, 8 Sim. 138; *Spire v. Smith*, 1 Beav. 419; *Mackenzie v. Mackenzie*, 2 Russ. 262, 273; *Wray v. Field*, 2 Russ. 257, 6 Mad. 300; *Watson v. Reid*, 5 Sim. 431; *Benyon v. Benyon*, 17 Ves. 34; *Sawrey v. Rumney*, 5 De Gex & Smale, 698.

⁵ *Moggridge v. Thackwell*, 1 Ves. Jr. 464; *Barclay v. Wainwright*, 3

§ 419. **Repetition of legacies by the same instrument.**—A different rule applies where legacies of money are given in the same instrument to the same person than where they are given in different instruments. If two money legacies of the *same amount* are given to the *same person* in the *same writing*, he shall only take one, the repetition being considered as resulting from inadvertence or forgetfulness.¹ This rule is applied though the conditions under which the different legacies are given are slightly different; as where one was to a married woman absolutely, and the other for her separate use.² Whether two or more instruments shall be regarded as one, or whether each shall be regarded as a different instrument, is a question often difficult to determine. The dates of the several instruments are not always conclusive. If the testator in the latter instrument refers to the former in words showing he then has its provisions in his mind, thus making it by incorporation a part of the latter, the two may be regarded as one.³ On the other hand, where the legacies, though given by the same instrument, are not of equal amount, whether the first or the last shall be the greater, they will be regarded as cumulative and the legatee shall take both.⁴

§ 420. **Repetition of legacies by different instruments, but prompted by same motives.**—The presumption that legacies given by *different instruments* are cumulative may be rebutted where they are of *equal amount*, and the *motive or reason* of both is the same. Thus, if the testator gives a thousand dollars "as a mark of appreciation" to his executor, and in a codi-

Ves. 466; Townshend v. Mostyn, 26 Ves. 72; Allen v. Callow, 3 Ves. 289.

¹ Duke of St. Albans v. Beauclerk, 2 Atk. 636, 638; Dickinson v. Overton (N. J.), 41 Atl. R. 949; Hooley v. Hatton, 1 Bro. C. C. 390, 2 Dick. 461, Lofft, 122, Godolph. pt. 2, c. 26, s. 46, Swinh. 526, 530.

² Greenwood v. Greenwood, 1 Bro. C. C. 31, n. The rule is applied also to gifts of annuities of the same amount. Holford v. Wood, 4 Ves. 76; Manning v. Thesiger, 3 My. & K. 29; Brine v. Ferrier, 7 Sim. 549.

³ Lee v. Pain, 4 Hare, 201, 231, 233; Duke of St. Albans v. Beauclerk,

2 Atk. 636, 638; Heming v. Clutterbuck, 1 Bligh (N. S.), 491, 492; Brine v. Ferrier, 7 Sim. 549; Edwards v. Rainier, 17 Ohio St. 597; Jones v. Creveling, 21 N. J. L. 573, 576.

⁴ Windham v. Windham, Rep. t. Finch, 267; Curry v. Pile, 2 Bro. C. C. 622; Pitt v. Pidgeon, 1 Ch. Cas. 301; Masters v. Masters, 1 P. W. 421, 423; Baylee v. Quinn, 2 Drew. & W. 116; Adnam v. Cole, 6 Beav. 353; Hartley v. Ostler, 22 Beav. 449; Bartlett v. Houdlette, 147 Mass. 25, 27; Creveling v. Jones, 21 N. J. L. 573, 576; Brennan v. Moran, 6 Ir. Ch. 126; De Witt v. Yates, 10 Johns. (N. Y.) 156.

cil executed shortly afterwards gives him the same amount stated for the same reason, it may reasonably be presumed from the reason stated that a mistake has been made, and that the latter legacy is substitutional. But the identity of the motive and of the amount must be proved. So where a testator bequeaths annuities of equal amount in a will and codicil to "his servant A.," the legacy is cumulative, as the term "servant" used does not describe the motive, but only describes the person.¹ And, though the motive for the legacies given in different instruments be the same, the legacies will be cumulative if their amounts differ.² If the provision in the first instrument is contingent upon events which may happen to the legatee, and these events have happened prior to the second legacy, the second legacy will be regarded as substitutional, and not cumulative, though it is the same in amount.³

The presumption that legacies given in different instruments to the same person are cumulative may be overruled by the intention shown by implication in the second instrument. If it shall appear that the testator intended to revoke the first legacy, or if it appears that he was simply explaining the provisions of the first legacy, or that he was pointing out a way in which they might be carried out, the mere repetition of the legacy will not make it cumulative.⁴ So, usually, where the legacies are given in two instruments of different dates, and it appears on comparing them that the later instrument is only a copy of the earlier, the legacy will be regarded, not as cumulative, but as substitutional.⁵

¹ *Roch v. Cullen*, 6 Hare, 531; *Ridges v. Morrison*, 1 Bro. C. C. 388. The testator gave his son a specific legacy, stating it was to be *his portion of the estate*, with a residuary bequest to all his children. Held, that the son could participate in the legacy of the residue. *Dickison v. Dickison* (Ill.), 28 N. E. R. 792, 36 Ill. App. 503.

² *Hooley v. Hatton*, 1 Bro. C. C. 390.

³ *Hurst v. Beach*, 5 Madd. 352; *Lord v. Sutcliffe*, 2 Sim. 273. Thus, where £50 was given in a will to A. for life, remainder to his children *living at his death*, and he died before the tes-

tator, leaving children, and the testator in a codicil gave to them the same sum, the court, having in view the altered conditions of family circumstances, held that the latter legacy was substitutional, not additional. *Allen v. Callow*, 3 Ves. 289; *Lee v. Pain*, 4 Hare, 201, 242.

⁴ *Martin v. Drinkwater*, 2 Beav. 215; *Bristow v. Bristow*, 5 Beav. 289; *Moggridge v. Thackwell*, 1 Ves. Jr. 464; *Fraser v. Byng*, 1 Russ. & My. 90; *Benyon v. Benyon*, 17 Ves. 34, 43.

⁵ *Coote v. Boyd*, 2 Bro. C. C. 521; *Barclay v. Wainwright*, 3 Ves. 462; *Hemming v. Gurney*, 2 Sim. & Stu.

§ 421. **Parol evidence to show character of legacies.**—Whether the presumption be that the latter of two legacies is substitutional, which would be the case where they are of equal amount and are given in one instrument, or whether it be that one is in addition to the other, which is the case where, though of equal amount, they are given in different instruments, parol evidence is admissible to rebut or support the presumption by showing the circumstances of the testator at the time.¹ But the declarations of the testator are not received to show the motive of the legacy, nor his intention either that the latter legacy shall be cumulative or substitutional, where such intention does not appear in the will.²

§ 422. **The intention of the testator as respects the repetition of legacies.**—The intention, as expressed in the will, indicating either that a later legacy is to be substituted for an earlier, or that it is cumulative, and that both are to be taken, will prevail over any presumption which may arise from the character or amount of the legacies themselves.³ Thus legacies in different wills, though equal in amount, will not be regarded as substitutional if it is evident from the instruments that the legatee is to take both.⁴ The ascertainment of the intention as to the character of the legacies depends upon the construction of the language. If the testator states that the latter legacy is “in addition” to the former given, it will ordinarily be conclusively presumed that it is cumulative,⁵ while if he shall state that the latter legacy is in lieu of the former, the contrary presumption is quite as conclusive; but express language may be dispensed with if the intention can be implied from the terms of the will.⁶ Thus, where the testator

311, 1 Bligh (N. S.), 479; Tuckey v. Henderson, 33 Beav. 174.

¹ Dewitt v. Yates, 10 John. 156; Russell v. St. Aubyn, L. R. 2 Ch. 405.

² Martin v. Drinkwater, 2 Beav. 215, 218; Hurst v. Beach, 5 Mad. 351, 358. See Hall v. Hill, 1 Drew. & War. 116; Guy v. Sharp, 1 My. & K. 589.

³ Yockney v. Hansard, 3 Hare, 620; Russell v. Dickson, 4 H. L. Cas. 293, 4 Ir. Eq. 339.

⁴ Lobley v. Stocks, 19 Beav. 292.

⁵ A legacy stated to be in addition

to a prior legacy *in a will* does not always show an intention that it shall be in addition to a prior legacy *in a codicil*. Watson v. Reed, 5 Sim. 431; Sawrey v. Rumney, 5 De Gex & Smale, 698; Spire v. Smith, 1 Beav. 419.

⁶ Sears v. Hardy, 120 Mass. 524, 541. A mere provision which points out to the executors the mode by which a legacy previously given shall be paid will not be regarded as giving a cumulative legacy. In re Powell's

divided a fund among legatees, and subsequently, *confirming the bequests by a codicil*, gave them a share in another fund, the legacies were regarded as cumulative.¹ So, where the testator gave A. a pecuniary legacy, with a share in the residue, and, in a codicil, another legacy stated to be "in consideration of her faithful attention, which was not to be taken from her share as provided in the will, but from the other legacies and bequests *pro rata*," it was held that the latter legacy was cumulative.² And, of course, where a testator directs that a certain sum shall be divided amongst legatees, already named, *pro rata*, the bequest is cumulative.³

§ 423. Substitutional and additional legacies liable to the incidents of the original.—A substitutional or an additional legacy will be subject to the same incidents and conditions, and is usually payable out of the same funds, as the original legacy to which it is added, or for which it is substituted, in the absence of a clear direction to the contrary.⁴ The rule that a substitutional legacy shall be liable to the incidents of the original legacy does not always apply where a lapsed legacy is given

Estate, 23 Atl. R. 92, 138 Pa. St. 322; Whyte v. Whyte, L. R. 17 Eq. 59.

¹ In re Zeile, 74 Cal. 125, 15 Pac. R. 455, 462.

² Coune v. Harned, 51 N. J. Eq. 554, 26 Atl. R. 810.

³ Logan's Estate, 131 N. Y. 456, 30 N. E. R. 1149; Chambers v. Chambers, 6 S. R. 659, 41 La. Ann. 443.

⁴ In re De Laveaga's Estate (Cal.), 51 Pac. R. 1074; Capron v. Capron, 6 Mackey (D. C.), 340; Snow v. Foley, 119 Mass. (1874), 103, 105; Barnes v. Marshall, 102 Mich. 248; Pike v. Waller, 15 Gray, 345, 347; Reid v. Walbach, 75 Md. 205 (1892), 23 Atl. R. 472; Hollyday v. Hollyday, 74 Md. 458, 22 Atl. R. 136; Executors v. King, 13 N. J. Eq. (1861), 375; Bullock's Estate, 7 Pa. Co. Ct. R. 439; Fife v. Miller, 30 Atl. R. 1015, 165 Pa. St. 612, 36 W. N. C. 37; In re Lejee's Estate, 5 Pa. Dis. Co. Ct. 625; In re Churchill's Estate, 60 Vt. 371, 14 Atl. R. 699; Crowder v. Clowes, 2 Ves. Jr. 449, 450; Cooper v. Day, 8 Mer. 154; Earl of

Shaftesbury v. Marlborough, 7 Sim. 237; Bristow v. Bristow, 5 Beav. 289; Fisher v. Brierly, 30 Beav. 265, 267; Johnstone v. Harrowby, 1 De Gex, F. & J. 183; Cookson v. Hancock, 1 Keen, 817, 2 My. & Cr. 606; Duncan v. Duncan, 27 Beav. 392; Warwick v. Hawkins, 5 De Gex & S. 481. For example, where the testator, giving his wife an estate for life in a farm, remainder to his children, added, "I divide the residue in the same proportion as in the foregoing bequests," and subsequently gave his wife a legacy in lieu of the life estate, the court held that she was not deprived of what she would take under the residuary clause. Hard v. Ashley, 117 N. Y. 606, 23 N. E. R. 177. A residuary legacy to be divided among legatees "hereinbefore named, share and share alike equally," gives each an equal share, though the original legacies varied greatly in amount. Marshall v. Hadley, 50 N. J. Eq. 547, 25 Atl. R. 325.

over to another person,¹ nor where conditions are attached to legacies *hereinafter given* (meaning in the will), and an additional legacy is given in a codicil.² Where a legacy is given to A. for life, with remainder to B., and another is given A. *in addition to the former gift*, the latter legacy will not be construed as subject to the limitations which are attached to the former which would cut it down to a life interest.³

§ 424. **The right to sue for a legacy.**—In the absence of statute, and, at the present time, in most states by statute, money legacies are due at the expiration of one year from the grant of letters testamentary. After that date an action in the nature of *assumpsit* may be maintained against the executor *virtute officii*, or as an individual, if the testator has not expressly made the legacy payable at some other period.⁴ The right to sue for a legacy existed at the common law and has been almost universally affirmed by statute.⁵

A tender of a legacy, with the interest due thereon, is a bar to a claim of subsequent interest.⁶ But a mere offer to pay a legacy, reserving the interest until the amount due shall have been judicially fixed, is not a valid tender which will stop the running of interest.⁷ A legatee who is entitled to a legacy payable in the future may, on application to the court, have a portion of the estate set apart until it becomes due.⁸ A general legacy is payable in cash though the testator has directed that it shall be invested for the legatee in certain securities. This will be regarded as advisory and directory, inasmuch as the legatee can at once dispose of the securities for money.⁹ A

¹ Chatteris v. Young, 2 Russ. 184.

² Bonner v. Bonner, 6 Sim. 97.

³ More's Trust, 10 Hare, 171; Mann v. Fuller, Kay, 624, 626. See also Haley v. Bannister, 23 Beav. 336; Hill v. Jones, 37 L. J. Ch. 465; Crassman's Estate, 113 N. Y. 503, 21 N. E. R. 180.

⁴ Loyd v. Loyd (Ky.), 46 S. W. R. 485; Blackler v. Boott, 114 Mass. 24, 25; Swasey v. Little, 7 Pick. (Mass.) 296; Steere v. Wood, 2 Atl. R. 551, 15 R. L. 199; Flummerfelt v. Flummerfelt, 51 N. J. Eq. 432, 26 Atl. R. 857; Wall v. Bulger, 46 Hun, 346. Cf. Vanzant v. Bigham, 76 Ga. 759.

⁵ Lee v. Smith, 84 Va. 289, 4 S. E. R. 817; Holt v. Libby, 80 Me. 329, 14 Atl. R. 201; In re Williams, 112 Cal. 521, 44 Pac. R. 808; Fulks v. Fulks, 6 N. Y. S. 112.

⁶ Morgan v. Valentine, 6 Dem. Sur. 18.

⁷ In re Wallace, 5 N. Y. Supp. 31.

⁸ Leslie v. Moser, 62 Ill. App. 555; In re Williams, 112 Cal. 521, 44 Pac. R. 808.

⁹ Furnish v. Rogers, 154 Ill. 569, 39 N. E. R. 939; Skinner's Trusts, 1 J. & H. 102.

cause of action for a legacy accrues either when it is due according to the directions of the will, or, if the will is silent, when it is payable by statute. The statute of limitations runs from that date. And it is not necessary either that the executor renounce or resign, or that the legatee shall have actual notice of the legacy or the will, or that other legacies shall be paid, or an order settling the estate be entered.¹ In the absence of statutory period of limitation, a legacy is presumed to be paid after the expiration of twenty years from the probate of the will.²

§ 425. **Interest on money legacies.**—Money legacies bear interest from the date on which they are payable, either one year after the death of the testator, or, in some cases, at the expiration of one year after the grant of letters testamentary.³

It is the duty of the executor to pay general legacies as soon as possible after the expiration of one year after the death of the testator. The fact that payment of a legacy is postponed by reason of circumstances over which he has no control, as, for example, because the probate of the will has been contested;⁴ or because the legatee has died during the year and his next of

¹ *Webster v. American Society* (Ohio St.), 33 N. E. R. 297.

² *Grimes v. Smith*, 70 Tex. 237, 8 S. W. R. 33; *Kingman v. Kingman*, 121 Mass. 248, 251.

³ *Powell v. Drake*, 19 D. C. 334; *Welch v. Adams*, 152 Mass. 74, 25 N. E. R. 24; *Ogden v. Pattee*, 149 Mass. 82, 21 N. E. R. 227; *Griggs v. Veghte*, 47 N. J. Eq. 506, 19 Atl. R. 867; *Davison v. Rake*, 44 N. J. Eq. 506, 16 Atl. R. 227; *Marsh v. Taylor*, 48 N. J. Eq. 1, 10 Atl. R. 496; *Hamilton v. McQuillan*, 82 Me. 204, 19 Atl. R. 167; *In re Goble's Will*, 10 N. Y. Supp. 18; *In re McKay*, 25 N. Y. S. 725, 5 Misc. R. 123; *Thorn v. Garner*, 118 N. Y. 198, 21 N. E. R. 148; *Moore v. Pullen* (N. C.), 21 S. E. R. 195; *Engle's Estate*, 167 Pa. St. 463, 31 Atl. R. 681; *Boer's Appeal*, 25 W. N. C. 567, 19 Atl. R. 404, 133 Pa. St. 426; *In re Watts' Estate*, 3 Pa. Dis. Ct. R. 343; *In re Eichelberger's Estate*, 32 Atl. R. 605, 170 Pa. St. 242; *Esmond v. Brown*, 18 R. I. 48,

25 Atl. R. 632; *In re Spenser*, 16 R. I. 25, 12 Atl. R. 124; *Cogdell v. Cogdell*, 3 Des. (S. C.) 346, 387; *Moorman v. Crockett*, 90 Va. 185, 17 S. E. R. 875; *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. R. 23; *In re Bignold*, L. R. 45 Ch. Div. 496; *Wood v. Penoyre*, 13 Ves. 333, 334; *Webster v. Hale*, 8 Ves. 410; *Gibson v. Bott*, 7 Ves. 96; *Benson v. Maud*, 6 Madd. 15; *Collyer v. Ashburner*, 2 De Gex & Sm. 404; *Pearson v. Pearson*, 1 S. & L. 10. The rule as to interest on general legacies is applicable to a legacy which consists of the interest on a sum specified and which is directed to be paid to the legatee during his life. *Davison v. Rake*, 44 N. J. Eq. 506, 16 Atl. R. 227.

⁴ *Powell v. Drake*, 19 D. C. 334; *Ogden v. Pattee*, 149 Mass. 82, 21 N. E. R. 227; *In re Watts' Estate*, 3 Pa. Dis. Ct. R. 343; *Wood v. Penoyre*, 13 Ves. 333.

kin have neglected to take out administration;¹ or because the testator has expressly extended the time for the settlement of the estate,² does not take the legacy out of the general rule of payment. It is the duty of the executor to keep all funds in his hands invested at the best rate of interest which is obtainable, consistent with their preservation from loss.³

Interest on legacies will be calculated according to the statutory rate which prevails where the testator is domiciled and where the personal assets are administered and invested, though the legacy given be stated in the will in foreign money.⁴ In England interest on legacies is always calculated at four *per centum*.⁵ If, however, the legacy, while unreasonably detained in the hands of the executor, *has earned more than the statutory rate* by his employment of it in trade or speculation, equity would demand that the legatee, and not the executor or the residuary estate, should have the benefit of it.⁶

Interest upon legacies will not be compounded,⁷ unless under the express direction of the testator,⁸ or unless the executor has refused or neglected to comply with a direction in the will to accumulate income and principal.⁹

A statute providing that no legacies shall be paid until after one year from the granting of letters testamentary, unless the testator directs them to be paid sooner, modifies the common-

¹ *Esmond v. Brown*, 18 R. L. 48, 25 Atl. R. 652.

² *In re Spencer*, 16 R. L. 25, 12 Atl. R. 124.

³ This is usually regulated by statute.

⁴ *Gravely v. Gravely*, 25 S. C. 1; *Loring v. Society* (Mass., 1898), 40 N. E. R. 936; *In re Bartlett* (Mass., 1898), 40 N. E. R. 899.

⁵ *Wood v. Bryant*, 2 Atk. 523; *Stapleton v. Conway*, 1 Ves. 427; *Treves v. Townsend*, 1 Bro. C. C. 386; *Sitwell v. Bernard*, 6 Ves. 543; *Bourke v. Ricketts*, 10 Ves. 330.

⁶ See *Crackett v. Bethune*, 1 J. & W. 586; *Jones v. Foxall*, 15 Beav. 388; *Mosley v. Ward*, 11 Ves. 581; *Knott v. Cotte*, 16 Beav. 77. Where an executor has a full discretion to pay a legacy out of the proceeds of land

directed to be sold at his convenience, interest begins to run on the legacy only from the time of an actual sale, which of course must not be unreasonably delayed. The land is equitably converted and the legacy vested as of the date of the death of the testator. *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 21 N. E. R. 75, 31 N. Y. Supp. 686, 10 Misc. R. 298, 33 N. Y. Supp. 887, 85 Hun. 420.

⁷ *Welch v. Adams*, 152 Mass. 74; *Gravely v. Gravely*, 25 S. C. 1, 25 N. E. R. 74; *Pearson v. Pearson*, 1 Sch. & Lef. 10; *Perkyns v. Baynton*, 1 Bro. C. C. 574; *Crackett v. Bethune*, 1 Jac. & Wal. 536.

⁸ *Arnold v. Arnold*, 2 My. & K. 365.

⁹ *Raphael v. Boehm*, 11 Ves. 92, 13 Ves. 590; *Dornford v. Dornford*, 13 Ves. 127.

law rule as to the payment of legacies; and interest begins to run from one year *after the grant of letters testamentary or of temporary administration*.¹ In case of a temporary administrator who has, by statute, the power of an executor to invest assets which are not required for the payment of debts, and to ascertain the condition of the estate, interest begins to run from his appointment, and not from one year after the subsequent appointment of an executor named in the will.²

§ 426. **Interest on advancements.**—Debts which are due the testator from legatees, and which are directed to be deducted from the legacies to which they may be entitled, will be regarded as advancements, and will bear no interest during the life of the testator.³ But all debts which are treated as advancements and are directed to be deducted from legacies bear interest after the expiration of one year from the death of the testator.⁴

§ 427. **Interest on legacies which are charged upon land.** In the absence of any mention of a particular time by the testator for its payment, a legacy charged upon the rents and profits of land devised will be presumed to be payable from the date of his death. The legacy will therefore carry interest from that date.⁵

This is the rule in England where the will is silent. But it is held in America that a legacy charged on land or upon per-

¹ *In re McGowan*, 124 N. Y. 529, 26 N. E. R. 1098, reversing *In re Wallace's Estate*, 57 Hun, 588, 11 N. Y. Supp. 80, and overruling *Thorn v. Garner*, 113 N. Y. 262, 21 N. E. R. 149. See also *Patterson's Estate*, 5 Misc. R. 178, 28 N. Y. S. 702; *Hiscock v. Fulton*, 63 Hun, 62, 17 N. Y. S. 408; *In re Pryor's Estate*, 57 Hun, 590, 10 N. Y. S. 861.

² *In re McGowan*, 124 N. Y. 529.

³ *Wilkins v. Wilkins*, 43 N. J. Eq. 595, 13 Atl. R. 620; *Patterson's Appeal*, 25 W. N. C. 803, 18 Atl. R. 430, 128 Pa. St. 269; *Thorn v. Garner*, 113 N. Y. 198, 21 N. E. R. 149. Where the testator had, during his life-time, made advancements of unequal amounts to all his children, the lar-

gest amount being \$28,000, and in his will directed his executors *to equalize their shares*, it was held that each child was entitled to interest on the difference between his or her advancement and \$28,000 from the date of the death of the testator down to the period of equalization and distribution. *Clark v. Helm*, 130 Ind. 117, 29 N. E. R. 568, 30 N. E. R. 795.

⁴ *Patterson's Appeal*, 128 Pa. St. 269, 25 W. N. C. 803, 18 Atl. R. 430.

⁵ *Maxwell v. Wethinghall*, 2 P. Wms. 26; *Stonehouse v. Evelyn*, 8 id. 254; *Spurway v. Glynn*, 9 Ves. 483; *Shirt v. Westby*, 16 Ves. 393, 396; *Pearson v. Pearson*, 1 Sch. & Lef. 10, 11; *In re Olive*, W. N., March 29, 1884, p. 81.

sonal property will bear interest only from the expiration of the time within which the court has ordered it paid to the legatee.¹ And if from the will it appears that the legacy which is a charge was not to vest until a future date, it will not of course carry interest until it has vested.²

§ 428. Interest on legacies in lieu of dower and for support of minors.— A pecuniary legacy given in lieu of dower carries interest *from the date of the death of the testator*, upon the presumption that the testator intended that his widow should receive support from his estate, to begin *at once at the date when she, because of his death, was deprived of the support and care which he was under a legal and moral obligation to supply*.³ If the testator has expressly postponed the payment of a legacy in lieu of dower;⁴ or directed that a money legacy in lieu of dower shall be paid *when convenient*;⁵ or, if he has provided for the support of his widow by other means in the will, *or otherwise*, a legacy to her, though in lieu of dower, will not draw interest from his death. And the widow loses her right to receive interest from the death of her husband by neglecting to claim it at the time she receives for her legacy.⁶

The presumption that where the testator gives a legacy for the support of the legatee he intended that the support shall begin with his death is applicable in the case of a legacy to a minor child of the testator, or to any one person to whom he stands *in loco parentis* and who *is also a minor*, as well as to the widow of the testator. Legacies for the support of these persons draw interest from the date of the death of the testator.⁷

¹ Evans v. Foster, 80 Wis. 509, 50 N. W. R. 410.

² Eberhardt v. Perelin, 48 N. J. Eq. 592, 23 Atl. R. 501; Appeal of Allegheny N. Bank, 130 Pa. St. 454, 18 Atl. Rep. 633.

³ Pollard v. Pollard, 1 Allen, 490, 491; Pollock v. Learnard, 102 Mass. 49, 55; Stout v. Stout, 44 N. J. Eq. 479, 15 Atl. R. 843; Hepburn v. Hepburn, 2 Bradf. (N. Y.) 298, 304; In re McKay, 25 N. Y. S. 725; Stevens v. Stevens, 30 N. Y. Supp. 625, 80 Hun, 514; Irby v. McCrae, 4 Des. (S. C.)

Eq. 422, 423; Le Terrier v. Bulwer, 3 Sim. 18.

⁴ In re Bignold, L. R. 45 Ch. Div. 496; In re Barnes' Estate, 7 App. Div. 13, 40 N. Y. S. 494.

⁵ Welch v. Adams, 153 Mass. 74, 25 N. E. R. 84.

⁶ In re Hodgman's Estate, 140 N. Y. 421, 35 N. E. R. 660, 69 Hun, 484, 23 N. Y. Supp. 725; Henry v. Henry (Ala.), 15 S. R. 916; Bohrer v. Otterback, 21 D. C. 32.

⁷ Pollard v. Pollard, 1 Allen, 490, 491; Howard v. Francis, 30 N. J. Eq.

But this presumption is not recognized in the case of a minor, where the testator directs that interest shall not be paid, where the time for the payment of the legacy is postponed,¹ or where the testator has, by the will *or otherwise*, made another provision for the support of the legatee.²

§ 429. **The testator must stand in loco parentis.**—It must be shown, necessarily by parol evidence, that the legatee was the legitimate child of the testator, or that he was a person towards whom the testator stood *in loco parentis* at the date of the execution of the will. If this does not appear,³ or if it shall appear that the legatee, though a child of the testator, was an adult,⁴ or was illegitimate,⁵ his legacy does not carry interest from the death of the testator, though it is expressly given for his support. Any evidence which shows either that the legatee does *not* occupy the place of a child towards the testator, or that he is *not* a minor, is admissible to rebut the presumption. Thus, in the case of a legacy to A., whom the testator in his will called "*his adopted daughter*," it may be proved that A. had in fact been adopted by the wife of the testator and not by the testator himself.⁶

§ 430. **Money in which a legacy is payable.**—In the absence of an intention to the contrary, it will be presumed that legacies are to be paid in the currency of the country where the

444; Hennions' Ex'r v. Jacobus, 27 N. J. Eq. 28, 30; Doten v. Doten, 66 N. H. 331, 20 Atl. R. 387; Barrow v. Barrow, 55 Hun, 503, 8 N. Y. S. 783; Lyon v. School, 127 N. Y. 502, 28 N. E. R. 17, 52 Hun, 350; Brownell's Estate, 1 Con. Sur. 175, 3 N. Y. S. 175; Morgan v. Valentine, 6 Dem. Sur. 18; Appeal of Provident L. & T. Co., 26 W. N. C. 180, 134 Pa. St. 426, 19 Atl. R. 692; Couch v. Eastham, 29 W. Va. 784, 3 S. E. R. 23; Dunn's Ex'r v. Rennick, 33 W. Va. 476, 10 S. E. R. 810; Carew v. Askew, 1 Cox, 244; Acherly v. Wheeler, 1 P. Wms. 783; Harvey v. Harvey, 2 P. Wms. 21, 22; Hill v. Hill, 3 V. & B. 183, 186; Beckford v. Tobin, 1 Ves. 310; May v. Potter, 25 W. R. 507; Mills v. Roberts, 1 Russ. & Ry. 555; Wilson v. Maddison, 2 Y. & C. C. C. 372. A legacy to a child

en ventre sa mere for its support draws interest from its birth. Rawlins v. Rawlins, 2 Cox, 423.

¹ Boner's Appeal, 133 Pa. St. 426, 25 W. N. C. 567, 19 Atl. R. 404.

² In re Rouse, 9 Hare, 649. See also Wynch v. Wynch, 1 Cox, 433, 434; Wall v. Wall, 15 Sim. 513; Rudge v. Winall, 12 Beav. 357; In re George, L. R. 5 Ch. D. 337.

³ Vonderhorst v. Vonderhorst, 41 Atl. R. 124; Butler v. Freeman, 3 Atk. 28; Houghton v. Harrison, 2 Atk. 330; Festing v. Allen, 5 Hare, 599.

⁴ Sullivan v. Winthrop, 1 Sumn. C. C. 1, 15; Hennion v. Jacobus, 27 N. J. Eq. 28, 30; Raven v. Waite, 1 Sw. 553, 557; In re Rouse, 9 Hare, 649.

⁵ Lowndes v. Lowndes, 15 Ves. 304.

⁶ In re Vedder's Will, 2 Con. Sur. 548, 15 N. Y. S. 798, 62 Hun, 275.

testator is domiciled at the date of his death. Where a testator, being domiciled in England during the civil war in America, gave a legacy in dollars to a resident of America, it was presumed that he meant it to be paid in American gold coin or its equivalent, and not in paper currency, which at and subsequent to the date of the execution of the will was below par in gold.¹ The legacy is not satisfied by the executors investing the sum mentioned in paper currency. So a legacy given in a foreign will in foreign currency, when paid to a legatee domiciled in a foreign country, must be remitted according to the full value of the currency of the country which is the domicile of the testator, without deduction for exchange or for the expense of remitting.²

§ 431. To whom legacies are properly payable.—Where a legatee is *non sui juris* his legacy must be paid to his guardian or committee,³ though the testator, not having his incompetency in mind, has directed that no legacy shall be paid except to the legatee direct and upon his personal receipt.⁴ Anciently it was the rule in equity in England that an infant legatee must wait until he became of age to receive his legacy, and that payment by the executor to his parents would not suffice unless with the approval of the chancellor,⁵ except where the legacy was very small,⁶ or was expressly for his support. This is no longer the rule. The legacy may be paid at once to the guardian of the infant.⁷ If the legacy is vested and the infant dies before his majority, a legacy payable at *majority* must be paid when due to his administrator.⁸ At common law a legacy to a married woman might be paid to her husband, though they had been judicially separated,⁹ or were living apart by agreement.¹⁰ But now under modern statutes conferring full property rights upon the *femme covert*, the legacy must be paid to her, and her re-

¹ *Gravely v. Gravely*, 25 S. C. 1.

² *Cockerell v. Barber*, 16 Ves. 461;
Campbell v. Braham, 1 Russ. & My.
453; *Yates v. Maddan*, 16 Sim. 613.

³ *Stevens v. Douglass*, 38 Atl. R.
730; *Moore v. Moore*, 50 N. J. Eq. 554,
25 Atl. R. 403; *Calvert v. Boullement*,
46 La. Ann. 1132, 15 S. R. 363.

⁴ *State v. Dunbar*, 99 Mich. 99, 57
N. W. R. 1103.

⁵ *Daglay v. Tolferry*, 1 P. W. 285.

⁶ *Walsh v. Walsh*, 1 Drew. 64. See
also *Cooper v. Thornton*, 3 Bro. C.
C. 90.

⁷ *In re Hawley*, 104 N. Y. 250, 10 N.
E. R. 352.

⁸ *Roden v. Smith*, Amb. 588.

⁹ *Chamberlain v. Hewson*, 1 Salk.
115.

¹⁰ *Palmer v. Trevor*, 1 Vern. 261.

ceipt alone will discharge the executor. A testator may appoint a trustee for a legatee who is incompetent to manage his own affairs, and for whom a committee has been appointed. Where the trustee has active duties to perform in caring for the property and in paying over the income for the support of the beneficiary, he has the right, as against the committee, to have the custody and control of the *corpus* of the property devised in trust. He cannot be compelled to pay the income of the property to the committee of the incompetent, where to do so would be to prevent him from carrying out the duties of the trust.¹

§ 432. **Apportionment of income between life tenant and remainderman when conversion is directed.**—The just apportionment of the income of a mixed fund of personal property, given in trust to pay the income to A. *for life*, and the *corpus* to be given to others absolutely on the death of A., is a matter often requiring great care and discrimination.

The cases may be thus classified. *First.* Those in which a conversion into permanent securities is *expressly directed*. *Second.* Those in which *no conversion is directed*, but the trustees are directed to pay *income only*, and the *corpus* goes to the remaindermen. *Third.* Those in which no conversion is directed, but the property is given to the successive takers *in specie*.

Where a personal residue is given to several in succession, and the trustees are expressly directed to sell and re-invest in non-wasting securities, they have a year to sell and re-invest. If they do not, the conversion will in equity be regarded as constructively taking place at the expiration of one year from the testator's death. The income of the personal residue which has accrued during the year beginning with the death of the testator, from that portion of it which in fact consisted at the death of the testator of the securities into which the whole has been directed to be converted, must be paid as income to the life tenant.² As regards the balance of the property which is

¹ Rudy's Appeal (Pa., 1887), 11 Atl. R. 398. See *post*, §§ 773, 781, 789. v. Ayer, 128 Mass. 575, 577; Sargent v. Sargent, 103 Mass. 297; Pollock v.

² Angerstein v. Martin, T. & R. 241; Learnard, 102 Mass. 49, 54; Lovering v. Minot, 9 Cush. (Mass.) 151, 157; Macpherson v. Macpherson, 16 Jur. Pollard v. Pollard, 1 Allen, 490; 847; Weed v. Putnam, 70 Me. 209, Minot v. Armory, 9 Cush. 377, 388, 211, 1 Am. Pro. Rep. 202, 205; Ayer 389; Cooke v. Meeker, 36 N. Y. 15.

directed to be re-invested, but which at the testator's death was in unapproved securities, the life tenant is *not* entitled to the *actual income which has been received upon it during the year*. He shall only receive as much money as will equal the income which the proceeds of that property will produce when converted and re-invested.¹ Where income is directed to be accumulated from the death of the testator in connection with the conversion of property into investment securities, and the actual conversion which is directed does *not take place* until *after* the expiration of a year, the income which accrues on the securities unconverted *after* the year has elapsed goes to the life tenant as income.² And the life tenant also takes the income on as much of the property as was in fact converted during the year following the testator's death, whether an accumulation was or was not directed.³ Where the trustees fail or neglect to convert wasting and large dividend-paying securities during the year, the amount of the income which is to be paid the life tenant must be computed as though all had been converted *at the expiration of the year*. This amount should then be paid to the life tenant, either from the date of the constructive conversion or from the death of the testator, according to whether an accumulation has or has not been directed.⁴

The same rules are invoked *in favor of the life tenant* as regards future reversionary property from which he might possibly never receive any income. Where trustees who have a discretion to delay conversion of reversionary interests negligently do so, the property will be regarded as having been converted into permanent securities *at the end of one year from*

¹ *Dimes v. Scott*, 4 Russ. 195, 209; the trustee should be charged with the difference between the amount paid to A. and a sum equal to the income that would have been received if the value of the securities had been invested in government securities at the expiration of one year from the death of the testator.
² *Sparling v. Parker*, 9 Beav. 524; *Mackie v. Mackie*, 5 Hare, 70; *Johnston v. Moore*, 27 L. J. Ch. 458.
³ *La Terriere v. Bulmer*, 2 Sim. 18.
⁴ *Dimes v. Scott*, 4 Russ. 195, 209; *Mills v. Mills*, 7 Sim. 501, 508.

Taylor v. Clark, 1 Hare, 161; *Allhusen v. Wittell*, L. R. 4 Eq. 295. See also cases cited in last note. In *Dimes v. Scott*, *supra*, a residue of personalty was given in trust to invest in land and government securities and pay the income to A. for life, and the capital to B. in remainder. The trustees failed for several years to sell certain securities which paid large dividends, but which were diminishing in value, and paid the actual dividend to A. Upon application by B., the chancellor held that

the death of the testator. Accordingly, where outstanding personal estate, as mortgage debts, with interest accrued thereon are paid to trustees, the *ratio* of the payment of the same to the life tenant is to be measured by ascertaining what sum placed at interest at the death of the testator, at the rate of interest which is payable upon securities into which the estate was to be converted, accumulating at compound interest and with annual rests, would have produced the amount received. That sum, when ascertained, is capital for the remainderman. The balance is income.¹ When it is impossible, without fault of the trustees, to convert perishable property within a year, the court will allow interest from the death of the testator upon its ascertained value at the rate which is payable on the securities into which they are directed to be converted.²

§ 433. Apportionment of income between life tenant and remainderman when no direction for conversion.—The question of the investment of personal property of a wasting nature, as leaseholds, life annuities, mining and manufacturing stock, or other securities paying a high rate of interest or dividends, but of a gradually diminishing or speculative value, which are given, *not specifically*, to several in succession, but which are given without a direction to sell and re-invest, is very important. As every devise of real estate, whether or not included in a residuary clause, is specific, the proper rule is to pay the net rents, less taxes, insurance, repairs, interest on incumbrances and running expenses, to the life tenant, and the *corpus*, whether it has appreciated or depreciated during the life tenancy, to the remainderman.³ In respect to personal property the rule of chancery is that all such property, whether permanent or wasting and comprised in a mixed residue, *in the absence of an intent to give it specifically*, where the income is given to one for life with a gift of the capital in remainder,

¹ *Wilkinson v. Duncan*, 23 Beav. 56 Conn. 423, 15 Atl. R. 406; *Marsh v. Taylor*, 43 N. J. Eq. 1, 10 Atl. R. 486; *In re Earl of Chesterfield's Trusts*, L. R. 24 Ch. D. 643; *In re Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. R. 867; *In re Fisher's Estate*, 8 N. Y. S. 10; *In re Flickwer's Estate*, 1885, Nov. 7, p. 184.

² *Gibson v. Bott*, 7 Ves. 89, 96; 136 Pa. St. 374, 26 W. N. C. 374, 20 Atl. R. 518; *In re Stanfield*, 31 N. E. S. 723; *Mehrtens v. Andrews*, 3 R. 1013, 135 N. Y. 292.

Beav. 72; *Lawrence v. Security Co.*, ³ See § 436.

and no conversion is expressly directed, must be sold and the proceeds invested in securities approved by the law. These, in England, are three *per cent.* consols, and in America those which are prescribed as proper investments for trustees by the statutes in the several states.¹ Where the testator has *not* given the property *in specie*, *i. e.*, where he has *not* directed that it shall continue as it was at his death, a direction to invest in permanent securities will be implied, in order that property which is wasting and perishable may be put in a permanent form, so that all the beneficiaries may take the income in succession. If a part of the residue was composed of precarious securities or wasting securities which are not recognized as proper investments for trustees, they should be sold and the proceeds re-invested.²

The life tenant does not take a specific gift of securities which are of a perishable nature, unless the testator has given them specifically. On the other hand, where a conversion is not expressly directed, the trustees cannot be compelled to convert, but they may set a value upon them, and pay the life tenant four *per centum* per annum on that value.³ The actual income of the securities may be treated as capital and the interest paid on the estimated value to the life tenant is income.⁴

¹ *Howe v. Lord Dartmouth*, 7 Ves. 137.

² *McDonald v. Irvine*, L. R. 8 Ch. D. 101, 111, 121; *Bate v. Hooper*, 5 D. M. & G. 338; *Hinves v. Hinves*, 3 Hare, 609, 611. See also *In re Shaw's Trusts*, L. R. 13 Eq. 125; *Craig v. Wheeler*, 29 L. J. (Ch.) 374; *Howard v. Kay*, 27 L. J. (N. S.) Ch. 448; *Wightwick v. Lord*, 3 Jur. (N. S.) 699; *Benn v. Dixon*, 10 Sim. 636; *Hood v. Clapham*, 19 Beav. 90; *Jebb v. Tugwell*, 28 Beav. 84, 2 De Gex & G. 775; *Wilkinson v. Duncan*, 23 Beav. 469; *Pickering v. Pickering*, 4 My. & Cr. 298.

³ *Meyer v. Simonson*, 5 De Gex, Fisher & S. 733; *Daines v. Eaton*, 70 L. T. (N. S.) 761.

⁴ *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Litchfield v. Baker*, 2 Beav. 481; *Morgan v. Morgan*, 14 Beav. 72;

Fryer v. Butler, 8 Sim. 442; *Helme v. Stratton*, 52 N. J. Eq. 591, 39 Atl. R. 337; *Corle v. Monkhouse*, 47 N. J. Eq. 73, 77. The value of irregular dividends, payable at uncertain dates, is to be computed by ascertaining what sum, *if received at the death of the testator, would*, with interest, making annual rests, amount to the dividend when paid. That sum is principal. The difference between it and the dividend is income. *Helme v. Straton*, 52 N. J. Eq. 591, 39 Atl. R. 337. Trustees ought not to convert and re-invest real or personal property merely for the purpose of augmenting the income of the life tenant unless they are expressly directed or empowered to do so. *West v. Robertson*, 67 Miss. 213, 7 S. R. 224; *In re Roe*, 119 N. Y. 509, 23 N. E. R. 1063.

§ 434. When successive takers of personalty shall enjoy in specie.—The rule stated in the preceding section, by which a conversion of wasting property may be compelled for the benefit of remaindermen, is not applicable where perishable, wasting or reversionary securities are given as a specific legacy, or specifically, for life according to a liberal construction of the language of the will.

Where the legacy to the persons who are to take in succession is strictly a *specific legacy*, *i. e.*, where the testator describes it as “my property,” or “my stocks,” and employs language which shows that the life tenant is to take it in the condition it is when the will is made, he takes it *in specie*, and cannot be compelled to have wasting securities converted at the suit of the devisees over.¹

It is not usually considered essential that the legacy shall be, technically speaking, specific. If, from the whole will, it seems to be the intention of the testator that property shall be enjoyed *in specie*, the remainderman has no equity to compel a conversion, although the gift is comprised wholly in a residuary clause.² It is difficult to determine what language is a sufficient indication of an intention that the parties shall take *in specie*.³ An express direction to sell the property at a certain date, *e. g.*, at the death of the tenant for life, shows conclusively that *he* shall enjoy it *in specie*.⁴ So, too, a direction that a conversion into permanent securities shall only take place with the consent of the life tenant,⁵ or where the power to reinvest is wholly discretionary in the trustees;⁶ or when all the general directions given to the trustees indicate an intention that the property is to be by them permanently preserved in the state in which it is left by the testator, and is to be enjoyed in that condition by the successive tenants, no conversion into permanent securities will be directed. In England it has been held that a direction to *keep buildings erected on leased land in repair*, and a power to *grant underleases*, were conclu-

¹ *In re James*, 146 N. Y. 78; *Vincent v. Newcombe*, 1 Younge, 599; *Hubbard v. Young*, 10 Beav. 203, 205; *Boys v. Boys*, 28 Beav. 436.

² *Hinves v. Hinves*, 3 Hare, 609, 611; *Corle v. Monkhouse*, 47 N. J. Eq. 73, 20 Atl. R. 367.

³ *McDonald v. Irvine*, L. R. 8 Ch. Div. 101, 123.

⁴ *Alcock v. Sloper*, 2 My. & Cr. 699; *Gray v. Siggers*, L. R. 15 Ch. D. 74; *Harvey v. Harvey*, 5 Beav. 134.

⁵ *Hinves v. Hinves*, 3 Hare, 609, 613.

⁶ *In re Thomas* (1891), 3 Ch. 482; *Simpson v. Lester*, 4 Jur. (N. S.) 1269.

sive of an intention that the tenant for life should receive the rents of such wasting property and enjoy it *in specie*. A direction to sell securities, and to re-invest the proceeds, may be of some value to show that the testator did not intend to continue the residue in those of a wasting character, though this may be as much for the protection of the property as to fix the relative rights of the successive takers.¹ And an express direction to convert a *part* of the funds into permanent securities may, by implication, indicate conclusively that the balance is to be enjoyed *in specie*.²

§ 435. **The right to premiums on securities as between life tenant and remainderman.**—A gift of the dividends or income of securities does not permit a life tenant, who has *not the right to enjoy the residue in specie*, to claim premiums which result from the sale of the securities;³ or the surplus proceeds of shares which have been sold and which remain after paying assessments due thereon;⁴ or any *bonus*, whether payable in shares or in money, which has been declared out of the surplus profits of the corporation during the life tenancy.⁵

On the other hand, a regular dividend belongs to the life tenant, though, at the option of the trustee, it may be taken either in money or in common stock, so long as it is not in the nature of a *bonus* or a share in the surplus which legally forms a part of the *corpus*.⁶ The life tenant who is to take *in specie* is en-

¹ *Morgan v. Morgan*, 14 Beav. 72, Ch. 618; *In re Hopkins' Trusts*, L. R. 88; *Lord v. Godfrey*, 4 Mad. 455, 459. 18 Eq. 697, 700; *In re Bouche*, L. R. 29

² *Howard v. Kay*, 27 L. J. Ch. 448; Ch. Div. 635, 658; *In re Eisner's Estate*, 175 Pa. St. 143 (1896), 34 Atl. R. 577. A gift of "income" does not

³ *In re Kernochan*, 104 N. Y. (1886), 618; *Duclos v. Benner*, 136 N. Y. (1892), 560, 32 N. E. R. 1002; *Cross v. L. I. Loan & Trust Co.*, 27 N. Y. S. 495; *Vedder's Estate*, 15 N. Y. S. 798, 2 Con. Sur. 548, 17 N. Y. S. 93, 62 Hun, 275; *Biden's Estate*, 85 Hun (1895), 572, 38 N. Y. S. 19; *Parker v. Seeley* (N. J., 1897), 38 Atl. R. 280; *Spooner v. Phillips*, 62 Conn. 62 (1892), 24 Atl. R. 624.

⁴ *Armitage v. Garnett*, 7 Reports, 290 (1898), 3 Ch. 837.

⁵ *Plumb v. Neild*, 29 L. J. (N. S.)

Ch. 618; *In re Hopkins' Trusts*, L. R. 18 Eq. 697, 700; *In re Bouche*, L. R. 29 Ch. Div. 635, 658; *In re Eisner's Estate*, 175 Pa. St. 143 (1896), 34 Atl. R. 577. A gift of "income" does not include new shares which are issued in place of old preferred shares which failed to receive the income. *Mills v. Britton*, 64 Conn. 4, 29 Atl. R. 231. See also § 436, and *cf. Law v. Alley* (N. H., 1898), 29 Atl. R. 636.

⁶ *Chapman v. Chapman*, 87 Ky. 140 (1888), 7 S. W. R. 901; *Hite v. Hite*, 93 Ky. 257 (1893), 20 S. W. R. 778; *Thomas v. Gregg*, 78 Md. 545, 28 Atl. R. 565; *In re Warren's Estate*, 11 N. Y. S. 787; *In re Wright's Estate*, 5 Pa. Co. Ct. R. 345; *Pritchett v. Trust Co.* (Tenn.), 36 S. W. R. 1064.

titled to a profit from a sale of land by trustees acting for an unincorporated association after the death of the testator in which the testator had a share, where the increased value of the land sold was due to the discovery of minerals *after* the death of the testator.¹ So, too, the life tenant, though entitled to income only, and not the remainderman, takes the profits of a business which accrue *after* the death of the testator.² And if it is shown to be the intention of the testator that the life tenant shall take and enjoy *in specie*, he is entitled to whatever premium or *bonus* may result from the sale of the securities which are comprised in the estate.³ Where a fund, invested in a business, suffered a loss by the failure of the business, the apportionment of which became necessary between the life tenant and remainderman, the *corpus* of the fund was determined by finding how much would, placed at legal interest at the date of the failure, have reached the amount received after the business was wound up.⁴

§ 436. What may be deducted from income to be paid life tenant.—The life tenant to whom income, or net income only, of *real estate* is bequeathed must permit all taxes, repairs⁵ to the property, insurance,⁶ water rates and expenses for the care and preservation of the buildings,⁷ assessments for improvements,⁸ and interest on incumbrances on the property,⁹ to be

¹ Appeal of Merchant's Fund, 186 Pa. St. 43, 20 Atl. R. 527, 26 W. N. C. 392. Cf. Thomson's Estate, 11 Pa. Co. Ct. R. 198.

² Buckingham v. Morrison, 136 Ill. 437, 27 N. E. R. 65. And where a life tenancy and a remainder were created in a partnership, and the executors continued the business until many years later, when it was incorporated, the life tenant and the remainderman will then take the same proportion of shares in the corporation as their interests bore to one another, when the original appraisal was made at the death of the testator, without regard to the relative increase of value of the property owned by the firm. Hotchkiss v. Brainard Co., 58 Conn. 120.

³ In re James, 40 N. E. R. 876, 146 N. Y. 78.

⁴ Greene v. Greene, 19 R. I. 619, 626, 35 Atl. R. 1042.

⁵ *Contra*, Greene v. Greene, 19 R. I. 619, 626, 35 Atl. R. 1042.

⁶ Hopkins v. Keazer, 36 Atl. R. 615.

⁷ Clarke v. Clarke, 145 N. Y. 476, 40 N. E. R. 220, 29 N. Y. S. 338, 8 Misc. R. 339; In re Cornell's Estate, 17 Misc. R. 680, 41 N. Y. S. 539; In re Patterson's Estate, 15 Pa. Co. Ct. R. 520, 3 Pa. Dist. Ct. R. 796; In re Braunsdorf's Estate, 37 N. Y. S. 229, 2 App. Div. 73; Sohler v. Eldridge, 103 Mass. 345, 351; In re Redding (1897), 1 Ch. 876; Bridge v. Bridge, 15 N. E. R. 899, 146 Mass. 373; In re Fisher, 19 R. I. 53.

⁸ Warren v. Warren, 36 N. E. R. 611, 148 Ill. 641.

⁹ Ivory v. Klein (N. J. Eq.), 35 Atl. R. 346.

deducted from the income. But funeral expenses of the testator,¹ and counsel fees, and the expenses of probating the will and of administering the estate,² and all debts and specific and general legacies, must be paid out of the *corpus*.³

§ 436a. *Security by the tenant for life.*—A gift of property for life, with an absolute discretion in the life tenant to use the income and capital for maintenance and support, entitles him to possession and control; and the fund should be transferred to him by the executor without requiring security to protect the remainderman,⁴ though, being the widow of the testator, the life tenant is insolvent and of extravagant habits.⁵ The fact that there is a gift over of "what remains," if an absolute power to consume principal and income is conferred, is not material.⁶

If, however, it appears that the life tenant is wasting the capital, or is devoting it or the income to purposes which are *ultra* the powers conferred upon him, the court may, upon the application of a remainderman, compel him to give security against waste or a trustee may be appointed.⁷ If the fund is left in trust to pay the income to a legatee for life, and the *corpus* over in remainder, the life tenant is not entitled to the possession or control of the capital.⁸

¹ *Wetherel v. Safe Dep. Co.*, 79 Md. 153, 28 Atl. R. 812.

² *Bridge v. Bridge*, 15 N. E. R. 899, 146 Mass. 373.

³ *Amory v. Lowell*, 1 Allen (Mass.), 504, 507.

⁴ *Sowards v. Taylor*, 43 Ill. App. 275; *Pierce v. Stidworthy*, 81 Me. 50, 16 Atl. R. 333; *In re Garrity's Estate*, 108 Cal. 463, 38 Pac. R. 828.

⁵ *Martin v. Martin*, 69 Miss. 315, 13 S. R. 267.

⁶ *Smith v. Beardsley*, 2 C. C. A. 118, 4 U. S. App. 580, 51 Fed. R. 122; *Hill v. Harding*, 92 Ky. 76, 17 S. W. R. 199; *Fox v. Senter*, 22 Atl. R. 173, 83 Me. 295; *Parks' Adm'r v. Missionary Society*, 62 Vt. 19, 20 Atl. R. 107; *Rosegate v. South*, 46 Ohio St. 391, 21 N. E. R. 641. This rule applies where the gift is of the rents and profits for life, but no trustee has

been appointed. *In re Benedict*, 33 N. Y. Supp. 193; *In re Swan*, 14 N. Y. Supp. 604, 60 Hun. 286; §§ 636-639.

⁷ *Waldo v. Cummings*, 45 Ill. 421; *Stone v. McEckron*, 57 Conn. 194, 17 Atl. R. 8; *Fuller v. Fuller*, 84 Me. 475, 24 Atl. R. 946; *Whitemore v. Russell*, 80 Me. 297, 14 Atl. R. 107; *McClerman v. McClerman*, 73 Md. 283, 20 Atl. R. 908. See also *Scott v. Scott*, 6 Misc. R. 174, 27 N. Y. Supp. 152. Thus a widow *who is a non-resident* will not be permitted to control the *corpus*, unless she gives a bond, even though given in lieu of dower. *In re McDougall*, 35 N. E. R. 961, 141 N. Y. 21.

⁸ *Mackay v. Mackay*, 107 Cal. 303, 40 Pac. R. 558; *Stone v. Littlefield*, 151 Mass. 485, 24 N. E. R. 593; *Fuller v. Fuller*, 84 Me. 475, 24 Atl. R. 946.

CHAPTER XX.

THE EQUITABLE DOCTRINE OF SATISFACTION.

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| <p>§ 437. Definition of satisfaction.</p> <p>438. The doctrines of election and satisfaction distinguished.</p> <p>439. The doctrine of satisfaction distinguished from the ademption of legacies.</p> <p>440. The satisfaction of a legacy by a subsequent portion—Satisfaction may be <i>pro tanto</i> as well as in full.</p> <p>441. Difference in the character and limitations of the legacy and the portion.</p> <p>442. The effect of gifts to the husband of a legatee as a satisfaction.</p> <p>443. The legacy and the portion must be <i>ejusdem generis</i>.</p> <p>444. Testator must stand <i>in loco parentis</i> to the legatee.</p> <p>445. Satisfaction of residuary legacy by a portion.</p> <p>446. No presumption of satisfaction in the case of advancements prior to the will.</p> | <p>§ 447. Express directions to account for advancements prior to execution.</p> <p>448. The satisfaction of marriage settlements by subsequent legacies.</p> <p>449. Satisfaction where a legacy is given for a particular purpose.</p> <p>450. Satisfaction in case of a bequest to the creditor of the testator.</p> <p>451. Legacy to a child or wife to whom the testator is indebted.</p> <p>452. No presumption of satisfaction where a legacy is to the debtor of the testator.</p> <p>453. The effect of the republication of the will upon a legacy which has been satisfied.</p> <p>454. The disposition of legacies which have been satisfied.</p> |
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§ 437. Definition of satisfaction.—Satisfaction, which is of equitable origin, is the giving of a thing with the intention on the part of the donor, but not of necessity on the part of the donee, that it shall be taken, either wholly or in part, in extinguishment of some existing claim of the donee on the donor.¹ The principles of the doctrine of satisfaction are properly invoked in two classes of cases. *First*. Where a father, or a person occupying the place of a parent towards the donee, makes a double provision for him, either by two gifts *inter vivos* or by a testamentary provision and by a *subsequent gift inter vivos*. *Secondly*. Where a debtor by his will gives money or other property to his creditor without mentioning the debt.

¹ Lord Chichester v. Coventry, L. R. 2 H. L. Cases, 71, 95.

In the case of a father the earlier provision may have been by a will, and subsequently, either on the marriage of his child, the legatee, or on some other occasion, the father may make a settlement upon the child by way of a "portion," as it is termed. Or, having agreed to give the child something upon his or her marriage, he subsequently bequeaths the child a legacy.¹ Satisfaction may arise in the case of a gift to a creditor from the debtor in the will of the latter, where the amount of the legacy is equal to or in excess of the amount of the debt. But the rule of the extinguishment of the debt by the legacy is not favored by the courts. The equitable presumption against double portions has, of course, no application here, and trivial circumstances will take a case out of the rule.²

It should be particularly noted that the presumption of satisfaction is a presumption of an existing intention. So far as it relates to wills it *arises only where the will is silent*. The intention of the testator, declared expressly or by necessary implication, that a gift in his will is to be in lieu of what he has agreed to settle upon the legatee, or his declared intention that what he gives after execution is to be deducted from what the prior will gives, or that his creditor is to have both the debt and the legacy, or the contrary, is always controlling.

The presumption of satisfaction is more readily raised where the *prior gift is in a will*, and the testator, standing *in loco parentis* to the legatee, subsequently bestows a portion, than where by some irrevocable instrument the testator has bound himself to pay money or convey land to a child, and subsequently gives the child to whom he is bound a legacy by his will. The will being always revocable in the life of the testator, it is very reasonable to assume that what has been given subsequently to its execution was given in anticipation of its operation. But where the will *comes first*, and later the testator agrees to give to a child, who is a legatee in the will, a portion, it may very well be that, *by not revoking the will after making the gift inter vivos*, he intended the legatee to take both.

§ 438. The doctrines of election and satisfaction distinguished.—As has been elsewhere pointed out in detail, the equitable rules of election are invoked where the testator in

¹ See *post*, § 448.

² *Post*, § 450.

his will gives property of his own to A., and in the same will gives property which belongs to A. to some third person. A. will be compelled to elect between what the will gives him and what the will gives of his property to another.¹ Satisfaction applies where the testator, who is *legally bound to A.*, gives him property by his will which is presumed to be in satisfaction of this obligation, and which property is to be received by A. under the will as a substitution for what the testator was obligated to him. The principal distinction lies in the source of A.'s title to the property which he is compelled to forego. In the case of an election he derives his title independently of the testator. In the case of satisfaction he would have derived his title from the testator but for the presumption of an intention that he is to release all claims to the property, which arises from the circumstances of the case.

§ 439. **The doctrine of satisfaction distinguished from the ademption of legacies.**—The giving of a portion to a legatee subsequent to the execution of a will by which the legacy is given is sometimes called ademption. The term "ademption," as thus used, is inaccurate and may lead to confusion. Ademption, properly so called, operates independently of intention in case the specific thing given is, at the death of the testator, no longer owned by him, and hence cannot, of necessity, be delivered to the legatee.² But satisfaction depends *wholly* upon intention, so that the presumption of satisfaction is rebutted if the existence of a contrary intention is ascertained³ from the will or by parol; and a legacy may be satisfied irrespective of the fact that the thing bequeathed is in the ownership of the testator at his death. The rule of satisfaction is based upon a presumption against double portions arising from circumstances, but only where the will is silent; and for this reason parol evidence is always admissible to show by the declarations of the testator that a contrary intention existed and to rebut the presumption of satisfaction. But the ademption of legacies is a *positive rule of law and construction*. If, by a construction of the will, it appears that a legacy is specific, and if it also appears that the thing bequeathed is no longer in the possession of the testator, parol evidence is not admissible

¹ *Post*, § 726.

³ § 437.

² *Ante*, §§ 410–415.

to show that the testator in fact intended the legatee to have some other similar thing, or a general legacy of the value of the article specifically given.

§ 440. The satisfaction of a legacy by a subsequent portion—Satisfaction may be *pro tanto* as well as in full.—Satisfaction takes place where a parent, or other person standing *in loco parentis* to a legatee, after giving him a legacy, gives him property without an expressed intention that he shall take both, and the gift and the legacy are *ejusdem generis*. In the leading English case¹ it was said that where, after bequeathing property to a child, the father subsequently gives him a portion, a complete and total satisfaction of the legacy takes place, though the amount of the portion is less than the legacy. But this rule of a total satisfaction was subsequently repudiated in England,² and has never been received with any favor in America. It is now the settled rule in equity that the amount of the subsequent provision is to be considered, and that a satisfaction *pro tanto* is recognized where the subsequent gift or portion is not of equal amount with the prior legacy.³

¹ *Ex parte Pye*, 18 Ves. 140, on page 152, by Lord Ch. Eldon.

² *Pym v. Lockyer*, 5 My. & Cr. 29.

³ *Roberts v. Weatherford*, 10 Ala. (1846), 72; *Cowles v. Cowles*, 56 Conn. (1888), 240, 18 Atl. R. 414; *Roquet v. Eldridge*, 118 Ind. 147, 151 (1888), 20 N. E. R. 633; *Clendening v. Clymer*, 17 Ind. (1861), 155, 159; *Weston v. Johnson*, 48 Ind. 1, 5, 1 Am. Pro. R. 13; *State v. Crossley*, 69 Ind. 203; *Robbins v. Swail*, 7 Ind. App. 486; *In re Lyon*, 79 Iowa (1886), 375, 379; *Davis v. Close* (Iowa), 73 N. W. R. 600; *Hayward v. Loper*, 147 Ill. 41 (1893), 85 N. E. R. 225; *Everett v. Carr*, 57 Me. 325, 331; *Strong v. Williams*, 12 Mass. (1815), 391; *Carmichael v. Lothrop*, 108 Mich. 473, 477, 66 N. W. R. 350; *Garth v. Garth*, 139 Mo. 450; *Van Houten v. Post*, 38 N. J. Eq. 344; *Hine v. Hine*, 29 Barb. (N. Y.) 507; *Van Riper v. Van Riper*, 2 N. J. Eq. (1841), 1; *Sims v. Sims*, 10 N. J. Eq. (1854), 158; *House v. Mallett*, 4 Jones' Eq. 194; *Miner v. Atherton*, 35

Pa. St. 528; *Garrett's Appeal*, 3 Harris (Pa.), 212; *Swoope's Appeal*, 27 Pa. St. 58; *Lanham v. Lanham*, 38 S. C. 129; *Moore v. Hilton*, 12 Leigh (Va.), 1; *Strother v. Mitchell*, 80 Va. 154; *Beck v. McGillis*, 9 Barb. (N. Y.) 56; *Pym v. Lockyer*, 5 My. & Cr. 29; *Kirk v. Eddowes*, 3 Hare, 509; *Montague v. Montague*, 15 Beav. 565; *Hopwood v. Hopwood*, L. R. 7 H. L. Cas. 728; *In re Pollock*, L. R. 28 Ch. Div. 552; *Tussaud v. Tussaud*, L. R. 9 Ch. Div. 363; *Lord Chichester v. Coventry*, L. R. 2 H. L. Cas. 71, 82, 95; *Cooper v. Macdonald*, L. R. 16 Eq. 257; *Montagu v. Earl of Sandwich*, L. R. 32 Ch. D. 525; *Hatfield v. Minet*, L. R. 8 Ch. D. 136; *Pollock v. Worrall*, L. R. 28 Ch. D. 552; *Trimmer v. Bayne*, 7 Ves. 508; *Sheffield v. Coventry*, 3 Russ. & My. 317; *Platt v. Platt*, 3 Sim. 503; *Lord Durham v. Wharton*, 3 Cl. & Fin. 146, 10 Bligh (N. S.), 526. In *Ex parte Pye* it is said: "Where a parent gives a legacy to a child, not stating the

According to the early cases it seems to have been necessary that the advancement subsequent to the will must be shown to have been a portion either on marriage or on some similar occasion. This is not now the rule.¹

But the doctrine of satisfaction does not apply to small gifts made to the legatee from time to time; for equity will not add up small payments by which to offset a prior legacy.²

§ 441. **Difference in the character and limitation of the legacy and the subsequent portion.**—The inclination of equity to overthrow double portions will not be thwarted because of some slight difference between the nature or limitation of the legacy and of the subsequent portion.³ Thus, a legacy to a daughter *absolutely* is satisfied by a subsequent provision on marriage for the daughter for life, and on her death to her children.⁴ And a legacy to a daughter for life, remainder to her children, is satisfied by a marriage settlement by the testator upon *her and her husband*.⁵ But, though a slight difference between the character of the legacy and the limitation of

purpose with which he gives it, the court understands him as giving a portion, and, by a sort of artificial rule, and a leaning against double portions, if the father afterwards advances a portion on the marriage of the child, though of less amount, it is a satisfaction of the whole or a part."

¹ See cases cited in note 3, p. 593.

² *Carmichael v. Lothrop*, 108 Mich. 473, 477, 70 N. W. R. 575; *Suisse v. Lowther*, 2 Hare, 434; *Watson v. Watson*, 33 Beav. 574; *Scholfield v. Heap*, 27 Beav. 93; *In re Peacock*, L. R. 14 Eq. 236, 240; *Ravenscroft v. Jones*, 33 Beav. 669, 671 et seq., 33 L. J. Ch. 432.

³ *Paine v. Parsons*, 14 Pick. (31 Mass.) 313; *Durham v. Wharton*, 8 Cl. & Fin. 146, 10 Bligh (N. S.), 526; *Hartopp v. Hartopp*, 17 Ves. 184, 191.

⁴ *Lord Chichester v. Coventry*, L. R. 2 H. L. Cas. 71, 92. It is said that parol evidence is admissible to rebut the presumption against double portions. In equity one portion is pre-

sumed to be in satisfaction of another, and the declarations of the testator are received, *not to show the intention contrary to the will*, but to show that the will actually speaks the testator's intention. If the testator in the will states that the legacy is in satisfaction of an existing agreement by which he was to pay the legatee money, his statement is conclusive and cannot be contradicted by evidence of his declarations. Parol evidence of the relations of the parties to show that the testator stood *in loco parentis* to the legatee, that he had been in the habit of making gifts to him, and generally of the facts and circumstances of the testator's estate, is always received. *Tussaud v. Tussaud*, L. R. 9 Ch. D. 363; *Pym v. Lockyer*, 5 My. & Cr. 29; *Smith v. Condor*, L. R. 9 Ch. D. 170; *Powys v. Mansfield*, 3 My. & Cr. 359.

⁵ *Kirk v. Eddowes*, 3 Hare, 509; *Carver v. Bowles*, 2 Russ. & My. 301.

the interest subsequently given is not material in rebutting the presumption that one is in satisfaction of the other, at least where the legatee will receive some *substantial benefit for himself* under the settlement, it is a general rule, founded upon common sense and justice, that a legacy to A. absolutely will not be satisfied by a gift by the testator to B., although A. and B. are related as parent and child, or as husband and wife, or in some other mode by which it is *extremely likely that the legatee will receive* the full benefit of the property which is in settlement. It has been held in England that a payment of money to the husband of a legatee, who is a daughter of the testator, in consideration of his making a marriage settlement upon the legatee, which he actually did,¹ or a marriage settlement by the testator upon his daughter, who is a legatee, for her life, remainder to her husband for his life,² is a portion and not a gift, and is to be taken as a satisfaction of the legacy to the daughter.

§ 442. **The effect of a gift to the husband of a legatee as a satisfaction.**—It has been often claimed that a legacy to the daughter of the testator is satisfied by a subsequent *gift by the testator to her husband* upon the ground that the gift must of necessity have been prompted by the affection of the testator for his daughter, and that it was perhaps made upon her suggestion and solicitation.³ But the indispensable element of satisfaction, *i. e.*, that the portion should have been given to one towards whom the testator stands *in loco parentis*, is absent in this case; nor does it always follow that the daughter would have received any benefit from the gift to her husband. Hence in many of the recent cases, particularly in the United States, the courts have uniformly held that a legacy to a daughter *cannot* be regarded as satisfied by payments of money subsequently made to her husband, which are not made to him in consideration of a marriage settlement made by him upon his wife, and from which, therefore, the wife derives no benefit.⁴

¹ Lord Durham v. Wharton, 8 Cl. & Fin. 146; Nevin v. Drysdale, L. R. 4 Eq. 517. Barber v. Taylor, 9 Dana (39 Ky.) 84; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685.

² Weall v. Rice, 2 Russ. & My. 251; Hart v. Johnson, 81 Ga. 734 (1888).
Chichester v. Coventry, L. R. 2 H. L. Cas. 71. 8 S. E. R. 73; In re Lyon, 70 Iowa (1886), 375, 378, 30 N. E. R. 642; Decrow

³ Towles v. Rountree, 10 Fla. 299; v. Moody, 73 Ma. 100; Paine v. Par-

§ 443. **The legacy and the portion must be ejusdem generis.**—The presumption of the satisfaction of a legacy is repelled where the legacy and the subsequent portion are not *ejusdem generis*. This fact may be shown by extrinsic evidence. Thus a devise of land cannot be satisfied by a subsequent payment of money,¹ nor will a money legacy be satisfied by a subsequent conveyance of land.² So, too, a money legacy is not satisfied by a gift to the legatee of a stock in trade,³ nor by the payment to him of an annuity,⁴ nor a vested gift by one that is uncertain and contingent.⁵ So also a conveyance of lands to a devisee, made subsequent to a devise of other lands to him, is not presumptively to be taken as a satisfaction of the devise.⁶ But where the testator devises land to A., and subsequently conveys the *same land* to him, the devise is extinguished under the rule of ademption rather than under the doctrine of satisfaction.⁷

The modification of the doctrine of satisfaction, by which the portion and the testamentary gift are required to be *ejus-*

sons, 14 Pick. (Mass.) 313; Marquis de Portes, 14 Atl. R. 89, 44 N. J. Eq. 517; Bridges v. Hutchins, 11 Ired. (33 N. C.) Law, 68; Kennedy v. Kennedy, 27 S. C. 591, 2 S. E. R. 574; Ravenscroft v. Jones, 32 Beav. 669, 671, 4 De Gex, J. & S. 224; McClure v. Evans, 29 Beav. 422, 425; Ferris v. Goodburn, 27 L. J. Ch. 574. A legacy to the issue of A., which, in its character, is substitutionary upon A.'s death *before the testator*, is not satisfied by a subsequent provision for A. himself absolutely. Rose v. Rogers, 39 L. J. Ch. 791. The rule seems to be that if the provision made by the testator during his life expressly confers *some substantial benefit upon the legatee* and another, the legacy will be satisfied only so far as the legatee is benefited directly. Lord Chichester v. Coventry, 2 H. L. Cases, 71, 95.

¹Swails v. Swails, 98 Ind. (1884), 511, 514; Weston v. Johnson, 48 Ind. (1874), 1, 5; Campbell v. Martin, 87 Ind. 577; Roquet v. Eldridge, 118 Ind.

147, 149, 2 Am. St. R. 462; Allen v. Allen, 18 S. C. (1881), 512; Burnham v. Comfort, 108 N. Y. 535; Swope's Appeal, 27 Pa. St. 58.

²Carmichael v. Lothrop, 108 Mich. (1896), 473, 483; Dugan v. Hollis, 4 Md. Ch. 189; Bellasis v. Uthwaite, 1 Atk. 428; Goodfellow v. Burchett, 2 Vern. 298; Ray v. Stanhope, 2 Ch. R. 159; Grave v. Salisbury, 1 Bro. C. C. 425; Pierce v. Locke, 2 Ir. Ch. R. 205, 215; Richardson v. Eveland, 126 Ill. 37, 18 N. E. R. 308.

³Holmes v. Holmes, 1 Bro. C. C. 555.

⁴Watson v. Watson, 33 Beav. 574.

⁵Spinks v. Robins, 2 Atk. 493; Crompton v. Sale, 2 P. Wms. 553.

⁶Fisher v. Keithly (Mo., 1897), 43 S. W. R. 650; Carmichael v. Lothrop, 108 Mich. (1896), 473, 479; Arthur v. Arthur, 10 Barb. (N. Y., 1850), 9; Marshall v. Reuch, 8 Del. Ch. (1869), 239.

⁷Keans' Will, 9 Dana (Ky., 1839), 25; Skerrett v. Burd, 1 Whart. (Pa., 1835), 246.

dem generis, is unfavorably regarded by the courts.¹ If a legacy of \$1,000 is satisfied by a subsequent portion of \$1,000 in cash, why should it not be also satisfied by a conveyance of land of precisely the same value? The rule of satisfaction applies only where the intention of the parties is not ascertainable. If it shall appear from extrinsic evidence that the subsequent advancement, though not *ejusdem generis*, was intended by the parties to be in satisfaction of the prior testamentary provision, it will be so regarded.²

§ 444. **Testator must stand in loco parentis to the legatee.** The rule of the satisfaction of legacies by subsequent portions is only recognized where the testator is the father of the legatee, or stands *in loco parentis* towards him or her. The whole doctrine of satisfaction is based upon the injustice of permitting one of several who, by reason of their kinship, are conceived to have equal moral claims upon the bounty of the testator, to receive a larger share than the others, in the absence of clear proof that the testator intended that he should be preferred. This presumption against double portions, which is the basis of the doctrine of satisfaction, is, of course, never recognized where the testator gives property to a stranger; for, in such case, the motive of the gift is pure bounty and not the fulfillment of any moral obligation towards him on the part of the testator. The law permits the testator to dispose of his property freely as he may elect. But it will presume, *where the will is wholly silent*, that he will not prefer one child to another by giving him a double provision or portion; and this presumption is recognized not only where *several* persons exist to whom the testator stands *in loco parentis*, but where there is only *one*.

Whether the testator stands *in loco parentis* to a legatee is wholly a question of fact. It is a fact to be determined upon all the evidence, including the testator's declarations.³ The fact that the testator has adopted a legatee as his child, or that he has, while the legatee was a minor, supported, cared for and educated him or her, may raise a strong, and usually does raise

¹ *Pym v. Lockyer*, 5 My. & Cr. 29, 44, 48.

² *Carmichael v. Lothrop*, 108 Mich. 473, 477, 66 N. W. R. 350; *Jones v. Mason*, 5 Rand. (Va.) 577; *Bengough*

v. Walker, 15 Ves. 507. See also *In re Crawford*, 113 N. Y. 60, 20 N. E. R. 692; *Montagu v. Sandwich*, W. N. 1835, April 23, p. 86.

³ Cases cited in next note.

a conclusive, presumption that he is *in loco parentis* to the legatee.¹

The reputed father of an illegitimate child cannot, as matter of law, be said to stand *ipso facto in loco parentis* to him, unless he furnishes him with the support which a minor child usually receives from his father.² And the burden of proof to show that a testator, who is related to a legatee, occupied the position of a parent to him, so as to bring the case within the rule, is always upon the person asserting it, and this he must do by proof of competent facts other than the mere relationship of the parties.³

§ 445. Satisfaction of a residuary legacy by portion.—When the rule was that a portion was only presumed to be in satisfaction of a legacy *when it was of equal amount*, a residuary gift could not be satisfied by a subsequent portion, as the gift in the will was of an indefinite and fluctuating amount of which the testator was ignorant, and which ultimately might prove to be evanescent and diminish to nothing at all.⁴ But now, since a satisfaction *pro tanto* is recognized as well as complete satisfaction, there can be no objection to permitting a portion to operate in satisfaction of a previous gift of a residue.⁵

§ 446. No presumption of satisfaction in the case of advancements prior to the will.—No presumption exists that a sum of money paid to or on account of a legatee by the testator, *prior to the execution of the will*, is in satisfaction of a legacy given in it, though the testator stands *in loco parentis* to the legatee, if the will is silent. To recognize such a pre-

¹ *Fowkes v. Pasco*, L. R. 10 Ch. App. 159; *De Graaf v. Terpenning*, 52 How. 343; *Monck v. Monck*, 1 B. & B. 298; *Pr. (N. Y.)* 813.

² *Powys v. Mansfield*, 8 My. & Cr. 359, 4 *Freemantle v. Banks*, 5 Ves. 85; 6 Sim. 528; *Booker v. Allen*, 2 Russ. Farnham v. Phillips, 2 Atk. 215; & M. 270; *Clendenning v. Clymer*, 17 Smith v. Strong, 4 Bro. C. C. 493; Ind. 155; *Langdon v. Astor*, 16 N. Y. Clendenning v. Clymer, 17 Ind. 155, 9; *Gill's Estate*, 1 Parsons' Eq. 139. 159; *Clark v. Jetton*, 5 Sneed (Tenn.), 229; 2 Story, Eq., § 1115.

³ *In re Lawes*, L. R. 20 Ch. D. 81, 86; *Weatherby v. Dixon*, 19 Ves. 406. ⁴ *Schofield v. Heap*, 27 Beav. 93;

⁵ *Roome v. Roome*, 3 Atk. 183; *Stevenson v. Masson*, L. R. 17 Eq. 78, 84; *Beckton v. Beckton*, 27 Beav. 99; *Powell v. Cleaver*, 2 Bro. C. C. 499, 517, 518; *Shudal v. Jekyll*, 2 Atk. 516, 518; *Twining v. Powell*, 2 Collyer, Montefiore v. Guadalla, 1 De Gex, F. & Jo. 93; *Lady Thynne v. Glengall*, 2 H. L. C. 121; *In re Turfler's Estate*, 23 N. Y. S. 135, 1 Misc. R. 58. *Campbell v. Campbell*, L. R. 1 Eq. 383; *Ellis v. Ellis*, 1 Sch. & Lef. 1; *Clendenning v. Clymer*, 17 Ind. 155,

sumption would be to vary and contradict the express language of the will, and to allow the intention to be shown by parol. The sum given before the will was made will not be taken as an advancement to be deducted from the legacy, but as a gift to be taken with it, in the absence of anything in the will to the contrary. The matter is one of intention, to be ascertained wholly from the will.¹

But a payment by a parent to a child may operate as a satisfaction of a legacy given him in a subsequent will, where it was received by the child under an agreement that it should be so applied, or with an understanding that it shall be deducted from the provision made for him by the will.²

§ 447. Express directions to account for advancements made prior to execution.—The rule that payments to a legatee, to whom the testator stands *in loco parentis*, made *before the execution of the will*, are not to be deducted from his legacy, is recognized only *where the will is silent*. A direction in the will to deduct all *sums* of money which, at the date of the will, are owing from the legatees to the testator, or to take into account whatever may, at his decease, be due the testator on his books from his children to whom legacies are given, is controlling, and shows that the amounts mentioned are not to be regarded as gifts, but as advancements.³

A direction to deduct *all advancements* does not apply to land which the testatrix states, in the will, she intends to convey to

¹ McCormick v. Hanks (Iowa), 75 N. W. R. 98; Jacques v. Swasey, 153 Mass. 596, 597; Paine v. Parsons, 14 Pick. (31 Mass., 1833), 318; Richards v. Humphreys, 15 Pick. (32 Mass.) 133; Jones v. Richardson, 5 Met. (46 Mass., 1842), 237, 253; Hartwell v. Price, 1 Gray (67 Mass., 1854), 587, 594; Langdon v. Astor, 16 N. Y. (1857), 9; In re Crawford, 113 N. Y. 560; McDonald v. McDonald, 42 S. C. 178; Chapman v. Allen, 56 Conn. 152, 14 Atl. R. 780; Wright's Appeal, 89 Pa. St. 70; Taylor v. Cartwright, L. R. 14 Eq. 167, 176; In re Peacock, L. R. 14 Eq. 236. Parol evidence is not received to show that a payment to a legatee is in satisfaction of a subsequent leg-
acy. In re Lyon, 70 Iowa, 375, 379, 30 N. W. R. 642.
² Rogers v. French, 19 Ga. 310, 322; In re Pickenbrock's Estate (Iowa, 1897), 70 N. W. R. 1094; Robins v. Swain, 32 N. E. R. 792, 34 id. 670, 7 Ind. App. 486; Yundt's Appeal, 13 Pa. St. 375; Musselman's Estate, 10 Watts (Pa.), 54; Upton v. Prince, Cas. Temp. Tal. 71; Taylor v. Cartwright, L. R. 14 Eq. 167, 176.
³ Eller v. Lillard, 107 N. C. 486, 12 S. E. R. 402; In re Roberts' Estate, 163 Pa. St. 408, 30 Atl. R. 213; Blackstone's Appeal, 30 Atl. R. 48, 64 Conn. 414; In re Twombly, 53 N. Y. Supp. 385, 24 Misc. R. 51; Coyne v. Boyce, 78 Md. 22, 26 Atl. R. 1021.

A. after its execution to make him equal to B., but which she then devises to him in the event that her death should occur before making the conveyance.¹ A direction to deduct debts due the testator from his children does not apply to accounts charged against them as advancements, and also mentioned as unavailable assets, where treating them as such would result in disinheriting one child, and treating them as gifts would result in an equal division.² A direction to account for advancements will not permit the executor to deduct from the share of a beneficiary money advanced to her husband,³ or father, to whom no legacy was given.⁴

Parol evidence, including the declarations of the testator and the legatee, as, for example, entries in the account books of either, and receipts, bills and statements of accounts rendered, are received as evidence where the testator in the will directs advancements to be accounted for, to show what debts and obligations are within the terms of the will.⁵

§ 448. **The satisfaction of marriage settlements by subsequent legacies.**—In England the doctrine of satisfaction is frequently applied to cases where a father or other person *in loco parentis* makes a marriage settlement, or an agreement to make one, upon his child, and subsequently gives that child a legacy.⁶ If the legacy is *less than the portion*, the satisfaction

¹ Hughes v. Kirkpatrick, 37 S. C. 161, 15 S. E. R. 912.

² In re Roberts' Estate, 111 N. Y. 372, 18 N. E. R. 843.

³ Erwin v. Smith, 95 Ga. 699, 22 S. E. R. 712.

⁴ Albert v. Albert, 74 Md. 526, 22 Atl. R. 408. Notes signed by the children of the testator and directed to be deducted from legacies to them are thereafter to be regarded as assets of the estate for the payment of debts or the satisfaction of legacies. Hammett v. Hammett, 38 S. C. 50, 16 S. E. R. 293; In re Strock, 158 Pa. St. 355, 33 W. N. C. 391. But a note to a child who takes no legacy is canceled by a direction to deduct it from legacies. Snider v. Snider, 149 Pa. St. 362, 24 Atl. R. 284. A direction to deduct "all obligations or evidences

of debts" which shall be due by a legatee means by "obligations" all instruments, including notes, and by "evidences of debts," receipts for money loaned. Hill v. Bloom, 41 N. J. Eq. 276, 7 Atl. R. 438.

⁵ May v. May, 28 Ala. (1856), 114; Rogers v. French, 19 Ga. (1856), 316; Nolan v. Bolton, 25 Ga. 352; Holliday v. Wingfield, 59 Ga. 208; Clendening v. Clymer, 17 Ind. (1861), 155; Dillman v. Cox, 23 Ind. 442; Tillotson v. Race, 22 N. Y. (1860), 122; Merkel's Appeal, 89 Pa. St. 343; Rickenbacker v. Zimmermann, 10 S. C. 115, 116.

⁶ Bruen v. Bruen, 2 Vern. 430; Duke of Somerset v. Duchess of Somerset, 1 Bro. C. C. 309, n.; Ackworth v. Ackworth, 1 Bro. C. C. 307; Byde v. Byde, 1 Bro. C. C. 308, 2 Eden, 19; Pole v. Lord Somers, 6 Ves. 309.

will only be *pro tanto*.¹ So strong is the presumption against double portions that substantial differences between the marriage settlement or other agreement and the subsequent legacy will not be enough to repel the rule. Where the settlement on marriage will result in a pecuniary benefit to others beside the legatee, while the legacy is to him or her only, the legacy will not be regarded as a satisfaction of the claims of others under the settlement. Thus, where property is settled upon a son of the testator for life, remainder to his wife for life, remainder in fee to the children, a gift to the son *absolutely* will not satisfy the claims of the wife or children under the settlement.² And in the converse case a legacy to children will not operate as a satisfaction of the interest which their parents are entitled to under a marriage settlement.³

On the other hand, the fact that a legacy does *not* give the life interest in property to the husband of the legatee which he would take under the marriage settlement,⁴ or where, under the will, the power of the husband is circumscribed as compared with what he might claim under the settlement,⁵ as where the will postpones his life interest until *after* the death of the wife, while under the settlement he took a prior life estate to hers,⁶ or the fact that his life estate given by the will is determinable upon his bankruptcy,⁷ does not prevent the legacy from operating as a satisfaction of his interest under the prior settlement. But a contingent interest given by the will cannot be regarded as a satisfaction of a vested interest to which the legatee is entitled under the prior contract.⁸ Where the marriage articles contain a proviso that advancements made by the parent *in his life-time* shall be accepted in satisfaction of its provisions, the courts have held that legacies,⁹

¹ Warren v. Warren, 1 Bro. C. C. 805, 1 Cox, 41.

² Lord Chichester v. Coventry, L. R. 2 H. L. Cas. 71, 95; Bethell v. Abraham, L. R. 3 Ch. D. 590, n., 22 W. R. 745; McCarogher v. Whieldon, L. R. 3 Eq. 236.

³ Mayd v. Field, L. R. 3 Ch. D. 587.

⁴ Mayd v. Field, L. R. 3 Ch. D. 587.

⁵ Thynne v. Earl of Glengall, L. R. 2 H. L. C. 121, 131.

⁶ Russell v. St. Aubyn, L. R. 2 Ch. D. 398; Romaine v. Onslow, 24 W. R. 899.

⁷ Russell v. St. Aubyn, L. R. 2 Ch. D. 398.

⁸ Bellasis v. Uthwatt, 1 Atk. 426; Hanbury v. Hanbury, 2 Bro. C. C. 352.

⁹ Cooper v. Cooper, L. R. 8 App. 813; Douglas v. Willis, 7 Hare, 310.

or the share which the child receives upon the death of the parent intestate,¹ cannot be deducted as a satisfaction.

§ 449. Satisfaction where legacy is given for a particular purpose.—A legacy given for a particular purpose to a legatee, towards whom the testator does *not* stand *in loco parentis*, is satisfied where the testator, during his life-time, accomplishes the purpose, or advances money to the legatee for that purpose.² Thus, a legacy to A. to pay what he owes B. is satisfied by the testator paying the debt which A. owes during his life-time.³

If, however, the purpose of the legacy is not wholly accomplished by the testator, or if the advancement and the legacy are to be paid upon different contingencies,⁴ or if the testator, after fulfilling the purpose of the legacy, executes a codicil which republishes the will, expressly referring to the legacy for the particular purpose,⁵ no satisfaction takes place.⁶

§ 450. Satisfaction in case of a bequest to the creditor of the testator.—A bequest by the testator to his creditor of a legacy as great as, or greater than, the debt, *without any mention of the debt in the will*, is regarded as a satisfaction of the debt, and the creditor cannot take both debt and legacy. He will be compelled to elect between them.⁷ The principles of equi-

¹ *Twisden v. Twisden*, 9 Ves. 413.

² *Taylor v. Tolen*, 38 N. J. Eq. (1884), 91; *Hine v. Hine*, 39 Barb. (N. Y., 1862), 507; *Parkhurst v. Howell*, L. R. 6 Ch. App. 136; *Monck v. Monck*, 1 Ball & Be. 298, 303.

³ *Tanton v. Keller*, 61 Ill. App. 625, 167 Ill. 129, 47 N. E. R. 376.

⁴ *Parkhurst v. Howell*, L. R. 6 Ch. App. 136; *Spinks v. Robins*, 2 Atk. 491; *Keiper's Appeal*, 124 Pa. St. 193, 23 W. N. C. 260, 16 Atl. R. 744.

⁵ *Elliott's Appeal*, 19 Atl. R. 32 (1890), 132 Pa. St. 164, 166.

⁶ Whether the purpose of the legacy must be known to the beneficiary, see *Langdon v. Astor*, 16 N. Y. 187.

⁷ *Malony v. Scanlon*, 53 Ill. (1870), 122; *Fetrow v. Krauss*, 61 Ill. App. 238; *Addison v. Bowie*, 2 Bland Ch. 606, 625; *Strong v. Williams*, 12

Mass. (1815), 389; *Smith v. Smith*, 1 Allen (33 Mass.), 129; *Gilliam v. Chancellor*, 43 Miss. 437; *Adams v. Adams* (N. J. Eq.), 35 Atl. R. 827; *Heisler v. Sharp*, 44 N. J. Eq. (1888), 167; *Van Riper v. Van Riper*, 2 N. J. Eq. (1838), 1; *In re Somerville*, 2 Con. Sur. 86, 20 N. Y. S. 76; *Perry v. Maxwell*, 3 Dev. (N. C.) Eq. 488; *In re Thoms*, 18 Pa. Co. Ct. R. 615; *Byrne v. Byrne*, 3 Serg. & R. (Pa., 1817), 54; *Horner v. McGaughy*, 62 Pa. St. 191; *Harris v. R. I. Co.*, 10 R. I. 313; *Crouch v. Davis*, 23 Gratt. (Va., 1873), 62; *Glover v. Patton*, 17 Sup. Ct. 411, 165 U. S. 394, 406; *Brown v. Dawson*, Fra. Ch. 240; *Fowler v. Fowler*, 3 P. W. 353; *Mathews v. Mathews*, 2 Ves. 636; *Stockton v. Stockton*, 4 Sim. 152; *Gaynor v. Wood*, 1 Dick. 331. Cf. *Jackson's Case*, 47 La. Ann. 1098.

table satisfaction which are applied to these cases, though now well recognized and firmly established, are not and never have been favored by the courts. They are applied only where the will is silent. And equity will seize upon slight circumstances in the character of the debt or the legacy to rebut the presumption that the testator did *not* intend that his creditor should receive the latter as well as the debt which is due him. No presumption of double portions, which is the basis of satisfaction in the case of gifts to those towards whom the testator stands *in loco parentis*, is applicable here. And though it is undoubtedly true that the testator should be *just before he is generous, still if his estate is large enough to pay what he owes all his creditors*, no reason exists why he may not make a gift to one of them as well as to another person.¹

If the testator owes a just debt at the date of the will, and gives his creditor a legacy of a greater amount or of precisely the same amount, and his estate is sufficient to pay both debt and legacy without depriving other persons of what is due them, why should not both debt and legacy be paid, though both are payable to the same person? To rule that the debt, if less than the legacy, shall be deducted from it, or, if they are exactly equal in value, that one shall wipe out the other, is to vary the meaning of the will, contrary to the expressly declared intention of the testator.

If the legacy which has by a debtor been given to his creditor is *smaller than the debt*,² or if, being of the same amount, is payable at a *different time*,³ or where the property which is given in the will is of a different nature from the matter which

¹ In *Talbot v. Duke of Shrewsbury*, Pre. Ch. 394 (1714), the rule is thus stated: "If any one being indebted to another in a sum of money does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice of the debt, this shall nevertheless be in satisfaction of the debt, so that he shall not have both the debt and the legacy."

² *Strong v. Williams*, 12 Mass. 389; *Cranmer's Case*, 2 Salk. 508; *Atkinson v. Webb*, 2 Vern. 278; *Eastwood*

v. Vinke, 2 P. W. 613, 617; In re *Schoenberger's Estate*, 5 Pa. Dis. Co. R. 488; *Huston v. Huston*, 37 Iowa, 663, 670; *Eaton v. Benton*, 2 Hill (S. C.), 576; *Cloud v. Clinkerbeard*, 8 B. Mon. (47 Ky.) 397.

³ *Fairer v. Park*, L. R. 3 Ch. Div. 309; In re *Dowse*, 50 L. J. Ch. 285; In re *Horlock*, 1 Ch. (1895), 516, 13 Reports, 356; *Nichols v. Judson*, 2 Atk. 300; *Charlton v. West*, 30 Beav. 124, 127; *Horner v. McGaughey*, 63 Pa. St. 191; *Stone v. Pennock*, 31 Mo. App. (1888), 544.

is the subject of the debt,¹ as where the debt is payable in money and the testamentary gift is of land,² or where the legacy is contingent, residuary or uncertain in its character or value,³ the presumption of satisfaction is rebutted. Thus a debt due a legatee under a trust settlement is not satisfied by a testamentary gift consisting of an absolute legal interest.⁴

The presumption that a legacy to a creditor is in satisfaction of the debt due him is not recognized *where the debt was incurred after the execution of the will*, for it cannot be presumed that a testator intended to pay a debt by a legacy made when no debt exists.⁵ Nor is it recognized where the debt is in the form of a promissory note, which, by the time of the testator's death, may have passed out of the possession of the legatee,⁶ or where it is a running account, the amount of which is always fluctuating, and which the testator did not know, or which it may be presumed he did not know, when he made his will.⁷

And usually an express direction in the will for the payment of debts,⁸ and, *a fortiori*, for the payment of *debts and legacies*,⁹ will be enough to rebut the presumption of satisfaction which

¹ Foresight v. Grant, 1 Ves. Jr. 298; Richardson v. Elphinstone, 2 id. 403; Alleyn v. Alleyn, 2 Ves. 37; Edelen v. Dent, 2 G. & J. (Md.) 185.

² Eastwood v. Vinke, 2 P. W. 614.

³ Devese v. Pontet, 1 Cox, 188; Barrett v. Beckford, 1 Ves. 519; Lady Thynne v. Earl of Glengall, 2 H. L. Cases, 154.

⁴ Fairer v. Park, L. R. 3 Ch. D. 309. The presumption of satisfaction is not rebutted because the debt is likely to diminish, as where it is a deposit.

⁵ In re Benkert's Estate, 18 Pa. Co. Ct. Rep. 603; Strong v. Williams, 12 Mass. 389; Cranmer's Case, 2 Salk. 508; Thomas v. Bennet, 2 P. W. 343; Plunkett v. Lewis, 3 Hare, 330; Sullivan v. Lattimore, 38 S. C. 158, 17 S. E. R. 701; Heisler v. Sharpe, 44 N. J. Eq. 167; Horner v. McGaughey, 63 Pa. St. 189.

⁶ Carr v. Easterbrooke, 3 Ves. 561.

⁷ Rawlins v. Powell, 1 P. W. 291, 298; Jeffs v. Wood, 2 P. W. 130; Thomas v. Bennett, 2 P. W. 343; Mathews v. Mathews, 2 Ves. 636; Richardson v. Greese, 3 Atk. 365, 368; Hinchliffe v. Hinchliffe, 3 Ves. 529; Carr v. Easterbrooke, 3 Ves. 561; Clarke v. Sewell, 3 Atk. 96; Smith v. Smith, 3 Beav. 324; Wathen v. Smith, 4 Madd. 325; Edelen v. Dent, 2 Gill & J. (Md.) 185; Sprenkle's Will (Pa., 1838), 15 Atl. R. 773.

⁸ In re Huish, 43 Ch. D. 260; Cole v. Willard, 25 Beav. 568, 578; Glover v. Hartcup, 34 Beav. 74; Pinchin v. Sims, 30 Beav. 119; Russell v. Minton, 42 N. J. Eq. 123; Strong v. Williams, 12 Mass. 389; Heisler v. Sharpe, 44 N. J. Eq. 167, 14 Atl. R. 624; Wade v. Dean (Ky., 1897), 43 S. W. R. 441.

⁹ Richardson v. Greese, 3 Atk. 64, 68; Hales v. Darrell, 3 Beav. 324, 332; Jefferies v. Mitchell, 20 Beav. 15.

arises where a legacy is bequeathed by the testator to his creditor.¹ Where the circumstances and character of the legacy to the creditor are such that a presumption of satisfaction arises, parol evidence, including the declarations of the testator, may be received to rebut this presumption. But where this presumption does not arise, it cannot be shown by parol that the legacy was meant to be a satisfaction of the debt, for that would be to vary the language of the will and to revoke it by parol.²

§ 451. **Legacy to a child or wife to whom the testator is indebted.**—Where the testator owes a debt to one of his children at the execution of a will in which he gives that child a legacy, the doctrine of satisfaction is placed upon the same basis as where the testator gives a legacy to a stranger who is his creditor. If the amount of the legacy is equal to or greater than the debt which the father owes his child, the debt is satisfied, but otherwise not. And any circumstance which will rebut the presumption where the legacy is to a stranger will rebut it where it is to a child to whom the testator is indebted.³

The same rules and principles are applicable to a legacy given by a husband to a wife to whom, at the date of the execution of the will, he is indebted.⁴ A provision in the will attached to a gift of real or personal property to the widow of the testator, that it is in lieu of dower and of *all other claims against, or interest in, the estate of the testator*, will not be sufficient to constitute the gift a satisfaction of a debt which, at the date of the will, is due from the testator to his wife, particularly where the will also directs that *the debts of the testator shall be paid and makes provision for that purpose*.⁵

¹ Dawson v. Dawson, L. R. 4 Eq. Chancellor, 43 Miss. 437; Kelly v. Kelly, 6 Rand. (Va., 1838), 176; Bryant v. Hunter, 8 Wash. C. C. 48; Fowler v. Fowler, 8 P. W. 353; Cole v. Willard, 25 Beav. 568; Atkinson v. Littlewood, L. R. 18 Eq. 595.

² Phillips v. McCoomb, 53 N. Y. 494.

³ Deichman v. Arndt, 49 N. J. Eq. (1891), 106, 22 Atl. R. 799; In re Sherman, 53 N. Y. S. 376, 24 Misc. R. 65; In re Thompson's Estate, 25 Pittsb. L. J. (N. S.) 120; Tolson v. Collins, 4 Ves. 482, 483; Stockton v. Stockton, 4 Sim. 152.

⁴ Graves v. Graves, 90 Wis. 306 (1895), 63 N. W. R. 271; Gilliam v.

Chancellor, 43 Miss. 437; Kelly v. Kelly, 6 Rand. (Va., 1838), 176; Bryant v. Hunter, 8 Wash. C. C. 48; Fowler v. Fowler, 8 P. W. 353; Cole v. Willard, 25 Beav. 568; Atkinson v. Littlewood, L. R. 18 Eq. 595. ⁵ Rusling v. Rusling's Ex'rs, 42 N. J. Eq. 594, 8 Atl. R. 534; Russell v. Minton, 42 N. J. Eq. 123, 7 Atl. R. 342; Adams v. Olin, 61 Hun, 318, 21 Civil Pro. R. 227, 16 N. Y. Supp. 132. The presumption that a legacy to a creditor is in extinguishment of the debt

§ 452. No presumption of satisfaction where a legacy is to a debtor of the testator.—The fact that a testator bequeaths a legacy to one who owes him money raises no presumption, where the will does not mention the debt, that the testator means to cancel it.¹ If the legacy is exactly equal in amount to the debt due the testator, it is in satisfaction of it, and nothing is to be paid by the executor.² If the amount of the legacy to the debtor exceeds the amount of the debt which is due from him, he is entitled only to the difference between them, and his assignee,³ or his judgment creditor,⁴ has no better equity than the legatee. The right of the executor to deduct the amount of the debt from the legacy to the debtor is prior to the lien of the judgment. But a debt which is due the testator and which is barred by statute cannot be revived against a legatee unless the testator directs that the amount of the debt shall be an offset to his bounty to the debtor, which, *because it is his bounty*, he has a legal right to do.⁵

The legal power of the testator to forgive debts due him, whether in the nature of advancements to his children or otherwise, cannot be doubted.⁶ A direction to cancel a debt due

does not apply to a legacy to children by a mother who is indebted to them. *Glover v. Patten*, 17 Sup. Ct. 411, 165 U. S. 394, 406.

¹ *Hayes v. Hayes*, 2 Del. Ch. (1859), 191; *Brown v. Evans*, 70 Iowa (1896), 368, 30 N. W. R. 638; *Huston v. Huston*, 37 Iowa, 668; *Cloud v. Clinkerbeard*, 8 B. Mon. (47 Ky.) 397; *Spath v. Ziegler*, 48 La. Ann. 1168; *Blackler v. Booth*, 114 Mass. 24, 25; *Gilliam v. Chancellor*, 43 Miss. 437, 641; *Baldwin v. Sheldon*, 48 Mich. (1882), 580; *Lafay v. Lafay*, 43 N. J. Eq. 206, 10 Atl. R. 206; *Foster's Estate*, 15 Misc. R. 175; *Clark v. Bogardus*, 2 Edw. Ch. (N. Y., 1834), 387, 12 Wend. (N. Y.), 67; *Dwight's Estate*, 35 N. E. R. 936, 141 N. Y. (1894), 258; *Tucker v. Moye*, 115 N. C. 71, 20 S. E. R. 186; *Bailey's Estate*, 153 Pa. St. 71, 402, 26 Atl. R. 186, 32 W. N. C. 26; *Zeigler v. Eckert*, 6 Pa. St. (1847), 18, 18; *Chaffee v. Maker*, 17 R. I. 789; *Hammett v. Hammett*, 38 S. C. 50, 16 S. E. R. 293;

Holmes v. Holmes, 36 Vt. 525; *Neville v. Dulany*, 89 Va. 842, 17 S. E. R. 475; *Hopkins v. Holt*, 9 Wis. (1859), 206; *Cowen v. Adams*, 78 Fed. R. 536.

² *Allen v. Merwin*, 121 Mass. 378, 380; *Strong v. Williams*, 12 Mass. (1815), 390.

³ *Bailey's Estate*, 156 Pa. St. 634, 33 W. N. C. 89.

⁴ *Armour v. Kendall*, 15 R. I. 193, 2 Atl. R. 311; *Irwin v. Palmer*, 91 Tenn. 463, 19 S. W. R. 320.

⁵ *Holt v. Libby*, 14 Atl. R. 201, 80 Me. 329.

⁶ *Wescott v. Rahy*, 2 Bro. C. C. 386; *Elliott v. Davenport*, 1 P. W. 83; *Maitland v. Adair*, 3 Ves. 281; *Pole v. Lord Sommers*, 6 Ves. 309, 323; *Izon v. Butler*, 2 Price, 34; *In re Sourby's Trusts*, 2 Kay & J. 630; *Kidder v. Kidder*, 33 Pa. St. 298; *Ziegler v. Eckert*, 6 Pa. St. 13, 18; 2 Redf. on Wills, 160-163; *Williams' Executors* (6th Am. ed.), 1362.

the testator is a legacy of the amount of the debt, and the debtor takes it as other legatees, subject to the claims of the creditors of the testator. If the legatee is not entitled to receive his debt, or if the estate is insolvent, or if a deficiency of assets exists, the legacy of the debt will abate with other legacies of its class.¹ But where the testator is solvent, his direction to cancel a debt due him is mandatory upon his executors, and they will be enjoined from prosecuting an action at law to collect it,² unless, as may happen, the testator has left the cancellation of the debts wholly to their discretion.³

§ 453. **The effect of the republication of the will upon a legacy which has been satisfied.**—The republication of a will *after* the giving of a portion which, from the circumstances, is conclusively presumed to operate as an ademption or satisfaction of a legacy in it, does not revive the legacy, though the subsequent will or codicil may expressly refer to the prior will. Republication acts only upon an existing will *as it is*; and, though the language giving the legacy which has been adeemed or satisfied may still be written upon the surface of the prior will, it is regarded as though actually obliterated or erased and as no part of the will itself. The satisfaction is in effect a revocation of the will *pro tanto*.⁴ If, however, the testator in the instrument of republication shall expressly refer to the legacy in a way which shows he regards it as still in force, such a recital may, by implication, either be taken as a new legacy of an equivalent amount, or as a declaration of inten-

¹ *Lewis v. Lundy* (N. J. Eq.), 9 Atl. R. 883; *Clark v. Bogardus*, 2 Edw. Ch. (N. Y., 1834), 387; *Hobart v. Stone*, 10 Pick. (27 Mass.) 215; *ante*, § 390.

² *Lewis v. Lundy's Ex'r* (N. J. Eq.), 9 Atl. R. 883.

³ *Moss v. Lane*, 50 N. J. Eq. 295, 23 Atl. R. 481. A direction to cancel debts "*now or heretofore*" existing does not apply to debts afterwards contracted. *Rogers v. McGuire*, 37 N. Y. Supp. 76, 90 Han, 455, 37 N. E. R. 432; *Waterman v. Allen*, 143 U. S. 196, 12 Sup. Ct. 435.

⁴ *Tanton v. Keller*, 167 Ill. 129, 143;

Ware v. People, 19 Ill. App. (1896), 196; *Paine v. Parsons*, 14 Pick. (31 Mass., 1833), 313, 318, 320; *Trustees v. Tufts* (Mass.), 23 N. E. R. 1006; *Richards v. Humphreys*, 15 Pick. (Mass., 1834), 133; *Langdon v. Astor*, 16 N. Y. 9, 57; *Howze v. Mallett*, 4 Jones' Eq. (57 N. C., 1858), 194; *Alsop's Appeal*, 9 Pa. St. (1848), 374; *Drinkwater v. Falconer*, 2 Ves. 626; *Cowper v. Mantell*, 22 Beav. 224; *Powys v. Mansfield*, 3 My. & Cr. 359, 376; *Ravenscroft v. Jones*, 4 De Gex, J. & G. 224, 228; *Montague v. Montague*, 15 Beav.

563, 571.

tion sufficient to rebut the presumption of satisfaction of the former one, and the legatee will then take both.¹

§ 454. The disposition of legacies which are satisfied.—A legacy to a child, which is satisfied, goes to the residuary legatees whether they are children or strangers.² A different rule applies where the bequest is of a residue to a stranger and to the children of the testator *as a class*, and the legacy to one of the latter has been satisfied. The stranger's share is not increased, but the satisfied legacy will be divided among the other members of the class.³ So, also, where the legacy to the child is limited over to a stranger upon the happening of a contingency, as upon the death of the legatee *without children*, the executory devise over will be defeated because of the satisfaction of the legacy by an absolute payment to the legatee.⁴

¹ *Hopwood v. Hopwood*, 22 Beav. 498; *In re Aird's Estate*, L. R. 12 Ch. 291; *post*, §§ 476-480.

² *Meinertzhagen v. Walters*, L. R. 7 Ch. App. 670, 20 W. R. 505.

³ *Twining v. Powell*, 2 Coll. 262.

⁴ *Kirk v. Eddowes*, 8 Hare, 509.

CHAPTER XXI.

SUITS TO CONSTRUE WILLS.

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| <p>§ 455. The jurisdiction of courts of equity to construe wills.</p> <p>456. Some immediate necessity for the construction must exist.</p> <p>457. Proper and necessary parties to an action to construe.</p> <p>458. The jurisdiction of courts of probate to construe wills.</p> <p>459. The court of construction cannot examine original will.</p> | <p>§ 460. What questions are determinable in the action to construe.</p> <p>461. The effect of the judgment construing the will, and rules regulating the awarding of costs.</p> <p>462. Statutes regulating costs in action to construe wills are to be applied liberally.</p> |
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§ 455. Jurisdiction of courts of equity to construe wills. Courts of equity, by reason of the power they possess over trusts and trustees, have inherent jurisdiction to construe wills which create trusts, either expressly or by necessary implication. This inherent power is often confirmed by statute. But it must always appear affirmatively that the will which it is desired to have construed does in fact create a trust or the court will not entertain the bill.¹ If the will does not involve

¹ *Williams v. Williams*, 73 Cal. 99, 14 Pac. R. 394; *In re Walkerly's Estate*, 108 Cal. 627, 41 Pac. R. 772; *Belfield v. Booth*, 27 Atl. R. 585, 63 Conn. 2; *Harrison v. Duesley*, 172 Ill. 629, 50 N. E. R. 227; *Minkler v. Simons*, 71 Ill. App. 462, 172 Ill. 323; *Longwith v. Riggs*, 123 Ill. 258, 14 N. E. R. 840; *Whitman v. Fisher*, 74 Ill. 147; *Cowdrey v. Hitchcock*, 103 Ill. 262; *Covert v. Sebern* (Iowa), 35 N. W. R. 636; *Wintermute v. Heinly*, 81 Iowa, 169, 47 N. W. R. 66; *Welch v. Adams*, 152 Mass. 74, 25 N. E. R. 74; *Greeley v. Nashua*, 62 N. H. 166; *Kilburn v. Dodd* (N. J., 1895), 30 Atl. R. 868; *Higgins v. Union T. Co.*, 10 N. Y. Supp. 389; *Avery v. Mabey*, 16 id. 607, 62 Hun, 619; *Simmons v. Burrell*, 28 N. Y. Supp. 625, 8 Misc. R. 388; *Tallman v. Tallman*, 23 N. Y. Supp. 734, 737, 3 Misc. R. 465; *Mellen v. Banning*, 14 N. Y. Supp. 665; *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. R. 546; *Whitney v. Whitney*, 63 Hun, 59, 18 N. Y. Supp. 3; *Chipman v. Montgomery*, 63 N. Y. 221, 230; *Baily v. Briggs*, 56 N. Y. 407; *Wager v. Wager*, 89 N. Y. 161; *Woodlief v. Merritt*, 96 N. C. 226, 2 S. E. R. 350; *Balsley v. Balsley*, 116 N. C. 472, 21 S. E. R. 954; *Chase v. Isherwood*, 1 Ohio N. P. 31 (Rev. Stat., sec. 6202); *Edgar v. Edgar*, 26 Oreg. 65, 37 Atl. R. 73; *Thornton v. Zea* (Tex.), 39 S. W. R. 595; *Sawtelle v. Ripley*, 85 Wis. 72, 55 N. W. R. 156; *Heiss v. Murphey*, 43 Wis. 45, 48; *Miller v. Drane* (Wis., 1898), 75 N. W. R. 413. In Texas the existence of a trust is not necessary to give a court jurisdiction to construe a will. *Crosson v. Dwyer* (Tex., 1895), 30 S. W. R. 929.

a trust, a court of equity has no jurisdiction to construe it, as the power of equity to entertain an action for the construction of a will arises wholly out of the jurisdiction of these courts over trusts. If the will creates a trust it is not material, in determining whether the court has jurisdiction, that the applicant for the construction of the will is seeking to overturn the trust in it.¹ But a trustee or executor suing to obtain the construction of a will has no right to seek to overthrow any of its provisions further than is necessary to show his inability to understand their meaning and his inability to execute them, and his desire to obtain the advice of the court as to their validity and significance.² It is not necessary, in order that the court of equity shall have jurisdiction, that the testator should have created an express trust in the will, or that the validity of the will should be sustained in order that a trust may be created. If upon the invalidity of a will of personal estate the executors would hold the property disposed of upon a resulting trust for the next of kin of the testator, equity has jurisdiction to construe the will.³

§ 456. Some immediate necessity for the construction must exist.—Some immediate necessity must exist for a construction of the will. There must be a present or impending controversy to be determined. That a doubt may arise at some future time which will necessitate an inquiry into the significance of the language of the testator is never sufficient to justify a construction of the will. If the executor or a trustee under the will is in doubt as to the operation, effect

¹ *Simmons v. Burrell*, 28 N. Y. Supp. 625, 8 Misc. R. 388.

² *Belfield v. Booth*, 63 Conn. 299, 27 Atl. R. 585.

³ *Read v. Williams*, 125 N. Y. 560, 26 N. E. R. 730; *Chipman v. Montgomery*, 63 N. Y. 221, distinguished. A statute as, e. g. N. Y. Code Civ. Pro., § 1886, which provides that the validity or effect of a testamentary disposition of real property may be determined by an action brought for that purpose in the supreme court, having equitable jurisdiction, does not permit an action to be brought by or

against one claiming the legal title to the property to determine legal rights. The will must, under the statute, involve the creation of a trust. The validity of the execution of a power of sale created by a will is not such a testamentary disposition as will give a court jurisdiction to construe a will to ascertain whether it has been properly executed, which does not contain a trust. *Whitney v. Whitney*, 63 Hun, 59, 18 N. Y. Supp. 8; *Mellen v. Mellen*, 34 N. E. R. 925, 139 N. Y. 210.

and meaning of any of its provisions, and if he is under a present necessity of acting, or if he knows or has good reason to believe that he will soon be called upon to take action under the doubtful provision, he should seasonably apply to a court of competent jurisdiction to obtain a judicial construction of the clause which is uncertain and doubtful. The applicant for the construction of the will must show that there is some necessity for his invocation of the wisdom of the court. He must show that some provision of the will is of dubious and uncertain meaning, and that he will soon be called upon to act under it, for the time and attention of the court cannot be occupied in construing that which stands in no need of construction or in solving speculative and contingent doubts which may never arise in the actual performance of the duties of the executor or trustee.¹

§ 457. Proper and necessary parties to an action to construe.—Any one who has an interest under the will, or who would take as heir or next of kin if any portion of the will, when construed, is pronounced invalid, may bring an action to construe. But in practice an action to construe is usually initiated by an executor or a trustee, and all parties interested must be joined as defendants.² The party who sues for a con-

¹ *Carroll v. Richardson*, 87 Ala. 605, 6 S. R. 342; *Williams v. Williams*, 14 Pac. R. 394, 73 Cal. 99; *Siddall v. Harrison*, 73 Cal. 560, 15 Pac. R. 130; *Goldtree v. Thompson*, 79 Cal. 613, 20 Pac. R. 414; *Ex parte Whalen* (Ky., 1897), 39 S. W. R. 35; *Baldwin v. Bean*, 59 Me. 481, 482; *Perkins v. Stearns*, 163 Mass. 247, 251; *Traphagen v. Levy*, 45 N. J. Eq. 448, 451; *Baxter's Executors v. Baxter*, 43 N. J. Eq. 82, 10 Atl. R. 814; *Stevens v. Dewey* (N. J. Eq.), 36 Atl. R. 825; *Thornton v. Zea* (Tex.), 89 S. W. R. 595; *Meacham v. Graham*, 98 Tenn. 190, 39 S. W. R. 190; *Morse v. Lyman*, 64 Vt. 167, 24 Atl. R. 763; *Blair v. Johnson's Heirs*, 64 Vt. 598, 24 Atl. R. 764; *Balsley v. Balsley*, 116 N. C. 472, 21 S. E. R. 954; *Tyson v. Tyson*, 100 N. C. 360, 6 S. E. R. 707; *Horton v. Cantwell*, 108 N. Y. 255, 15 N. E. R.

546. A bill brought by an executor to obtain the construction of a will cannot be entertained in a court of equity where it appears on the face of the will that the distribution of the principal of the estate among the legatees, upon which event alone the doubt can arise, does not take place for five years (*Morse v. Lyman*, 64 Vt. 167, 24 Atl. R. 763); or where, a devise having failed, the executor will never be called upon to sell the land or to act in the matter. *Tyson v. Tyson*, 100 N. C. 360, 6 S. E. R. 707.

² *Davis v. Barnstable*, 154 Mass. 324, 28 N. E. R. 165; *American Bible Society v. Healy*, 153 Mass. 197, 26 N. E. R. 404 (action brought by brother of testator); *Torrey v. Torrey* (N. J. Eq.), 36 Atl. R. 1084; *Stevens v. Dewey* (N. J. Eq.), 36 Atl. R. 825; *Traphagen v. Levy*, 45 N. J. Eq. 448, 451; *Adams*

struction must have some interest in the will, either as a beneficiary or as the next of kin of the testator.¹ But where one who has no standing to require a construction petitions for one, and the executor, in his answer, asks for it as well, and a construction seems essential under the circumstances, the court of equity will not dismiss the bill, but will proceed to determine the meaning of the doubtful provision in question.² Every person whose rights or interests will be affected, either favorably or adversely, by the construction which the court may put upon the will, is a necessary party defendant.³ Where the action is brought by the executor or a trustee, a co-executor⁴ or co-trustee,⁵ life tenants and remainderman,⁶ the heirs and the next of kin of the testator,⁷ and all the legatees,⁸ are necessary parties. If the testator, being domiciled abroad at the date of his death, has appointed an executor in this country, the foreign executors are not bound by a decree in an action to construe, brought by the American executor, by which their rights and the rights of the residuary legatees will be affected, but to which they are not made parties.⁹

v. Becker, 47 Hun, 65 (heir of the estate); Baldwin v. Palen, 24 Misc. R. 170, 53 N. Y. S. 520; Homer v. Mugridge, 24 Misc. R. 133, 53 N. Y. S. 293. That an administrator *cum testamento annexo* may bring an action for the construction of the will, see Stevens v. Dewey (N. J. Eq.), 36 Atl. R. 825.

¹ Tyson v. Tyson, 100 N. C. 360.

² Sawtelle v. Ripley, 55 N. W. R. 156, 85 Wis. 72, 75. See also Chipman v. Montgomery, 63 N. Y. 221. An executor cannot, after an estate has been judicially settled and the distribution made, bring an action to construe, in order to ascertain what passed to one of the beneficiaries; as, after his final accounting, he is no longer an interested party. Miles v. Strong, 60 Conn. 393, 22 Atl. R. 959.

³ See cases in note 1, p. 610.

⁴ Duclas v. Benner, 6 N. Y. Supp. 293, 53 Hun, 636; Benner v. Benner, 58 Hun, 609, 12 N. Y. Supp. 472.

⁵ Sawtelle v. Ripley, 85 Wis. 72, 75.

⁶ Security Co. v. Pratt, 32 Atl. R. 396, 65 Conn. 161. Cf. Horton v. Cantwell, 108 N. Y. 255.

⁷ Kennedy v. Merrick, 46 Neb. 200, 64 N. W. R. 960.

⁸ Dean v. Mumford (Mont.), 61 N. W. R. 7; Reed v. Patterson, 44 N. J. Eq. 211, 14 Atl. R. 490. But not an attaching creditor of a legatee. Phelps v. Phelps, 143 Mass. 570, 10 N. E. R. 452.

⁹ Rockwell v. Bradshaw, 34 Atl. R. 758, 67 Conn. 9. The fact that the executor who asks for the construction is also a legatee is not material. He may appear and be represented by different counsel in both capacities. In re Batchelder, 147 Mass. 565, 18 N. E. R. 225. Devisees who are also the heirs and next of kin of the testator should be made parties defendant in both capacities. Loner-son v. Vroom, 11 Atl. R. 13, 42 N. J. Eq. 290.

§ 458. **The jurisdiction of courts of probate to construe wills.**—A court of probate has jurisdiction to construe the provisions of a will as an incident of the statutory jurisdiction which it has over the probate of wills and over the estates of decedents, where the construction is necessary to a proper determination of any fact or issue which may be presented to it.¹ Thus, a probate court has by necessary implication the power to construe a will so far as may be necessary to determine questions arising upon an accounting of an executor or a testamentary trustee involving the legality of payments made by him in administering the estate of the testator, or in the course of the distribution or partition of the estate under the directions which are contained in the will, so far as the construction is necessary in order to ascertain who is entitled to the money.² But under a statutory power to construe a will, the probate court has no jurisdiction to determine questions of the title to real property where it is claimed adversely to the estate of the testator. Nor can jurisdiction be conferred by the consent of the parties.³

§ 459. **The court of construction cannot examine the original will.**—As a result of the rule that the decree of a competent court admitting a will of personal property to probate is conclusive in every collateral proceeding, it follows that the court of construction is bound by the probate copy of the will, and cannot call for the original, or accept it if it is offered in evidence to show that its contents differ from the probate copy. The certified copy of the will, as taken from the records of the probate court, is conclusively presumed to be correct, and the original cannot be offered to prove that it is erroneous.⁴

§ 460. **What questions are determinable in the action to construe.**—The court in construing the will will confine itself

¹ *Vestry v. Bostwick*, 8 App. D. C. N. J. Eq. 276, 7 Atl. R. 438; *Glover v. 452*; *Brown v. Stark*, 47 Mo. App. 370; *Reid*, 80 Mich. 228, 45 N. W. R. 91; *Ward v. Congregational Church*, 66 (Statutes, § 5964); *In re Shrader's Will*, 17 N. Y. Supp. 273, 63 Hun, 36, Vt. 490, 29 Atl. R. 770.

² *Brown v. Stark*, 47 Mo. App. 370; *In re Shaw's Estate*, 81 Me. 207, 16 Atl. R. 662; *In re Perkins' Estate*, 75 Hun, 129, 26 N. Y. Supp. 938; *In re Merriam's Will*, 136 N. Y. 58, 32 N. E. R. 621; *In re French*, 5 N. Y. Supp. 249, 52 Hun, 303; *Hill v. Bloom*, 41

N. J. Eq. 276, 7 Atl. R. 438; *Glover v. 452*; *Brown v. Stark*, 47 Mo. App. 370; *Reid*, 80 Mich. 228, 45 N. W. R. 91 (Statutes, § 5964); *In re Shrader's Will*, 17 N. Y. Supp. 273, 63 Hun, 36, 22 Civ. Pro. R. 55; *Webster v. Trust Co.*, 7 Wash. 642, 35 Pac. R. 1082.

³ *In re Walker's Will*, 32 N. E. R. 633, 136 N. Y. 20.

⁴ *Gann v. Gregory*, 3 D., M. & G. 777; *Barneby v. Tassell*, L. R. 11 Eq. 368.

to those portions of the instrument which are shown to possess a present doubtful or ambiguous meaning, and which are of present application according to the circumstances then existing. Provisions which are not uncertain cannot be inquired into, nor will a construction be given to provisions relating to future payments of income, nor to future and contingent interests in property which may never vest. The validity of the testamentary provisions and the title of the legatees and devisees thereunder will only be determined so far as is necessary to enable the executor to act at the present time.¹ The court will not, in construing the will, determine questions appertaining to the validity of assignments made by the beneficiaries purporting to convey their shares;² or to ascertain the amount of advancements which are due by a legatee;³ or to establish an alleged will as against an heir in possession of real property.⁴ The question whether certain persons are heirs and next of kin to the testator cannot be determined in an action to construe a will providing that the executor shall distribute the estate among the heirs and next of kin of the testator. The remedy of the claimants in such a case is an action at law to recover the legacies, which may be brought when they become payable.⁵

§ 461. The effect of the judgment construing the will and rules regulating the awarding of costs.—The judgment or decree which is rendered in an action to construe a will is conclusive only upon those who are parties to the action and those claiming under them. Persons who will be entitled to take under the will, only upon the happening of a contingency which has not yet arisen, cannot be bound and are not affected by the decree excluding them from a share of the estate. Thus, a devisee who is born after the rendition of the judgment cannot be prevented from taking under the will by a decree rendered prior to his birth, excluding persons born after a certain event from taking under the will.⁶

¹ *Austin v. Bailey*, 168 Mass. 270, 39 N. E. R. 1023; *Wahl v. Brewer*, 80 Atl. R. 654, 80 Md. 287; *Montagnani v. Blade*, 145 N. Y. 111, 89 N. E. R. 719; *Cochran v. Schell*, 19 N. Y. S. 424; *Bennett v. Packer* (Conn., 1898), 39 Atl. R. 739.

² *Jackson v. Thompson*, 84 Ma. 84, 24 Atl. R. 459.

³ *Marquise de Partes v. Hurlbut*, 44 N. J. Eq. 517, 14 Atl. R. 891.

⁴ *Anderson v. Anderson*, 112 N. Y. 104.

⁵ *Crouse v. Wilson*, 26 N. Y. Supp. 923, 73 Hun, 853.

⁶ *Hotaling v. Marsh*, 132 N. Y. 29, 30 N. E. R. 249, affirming 8 N. Y. Supp. 690.

§ 462. Statutes regulating costs in actions to construe wills are to be applied liberally.— If the court shall find that a construction of the will was necessary, costs may be awarded to the executor out of the estate,¹ or they may be directed to be paid equally by all the parties interested.² Where the doubtful provisions involve only a portion of the property disposed of, the costs of the proceeding must be met out of the proceeds of that portion, and the property which is disposed of by provisions which are neither doubtful nor ambiguous is not liable for costs.³ Where no necessity for a construction is found to exist in an action not brought by an executor,⁴ and in an action brought by an executor where the heirs and devisees file an answer demanding affirmative relief, which is denied,⁵ costs may be awarded the executor as against the heirs and devisees personally. But the expenses of the employment of an attorney for a non-resident devisee, whose appointment is necessary for the prosecution of the action, should be paid out of the estate.⁶

¹ *Lombard v. Witbeck*, 173 Ill. 396, 51 N. E. R. 61.

² *Howard v. Smith*, 78 Iowa, 73, 42 N. W. R. 585.

³ *Thomas v. Safe Deposit & Tr. Co.*, 23 Atl. R. 3, 73 Md. 451; *Moore v. Alden*, 80 Me. 801, 14 Atl. R. 192.

⁴ *Merrill v. Hayden*, 86 Me. 133, 29 Atl. R. 949. See also *Security Co. v. Pond*, 65 Conn. 161, 32 Atl. R. 396.

⁵ *Urey v. Urey*, 5 S. W. R. 859, 86 Ky. 354.

⁶ *Urey v. Urey*, *supra*; *Ingraham v. Ingraham*, 169 Ill. 433.

CHAPTER XXII.

THE CREATION OF ESTATES BY IMPLICATION IN WILLS.

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| <p>§ 463. Implication must be of necessity — Necessary implication defined.</p> <p>464. The effect of the introductory clause of a will in connection with the doctrine of gifts by implication.</p> <p>465. Estates in fee-simple arising by implication from a personal charge on the devisee.</p> <p>466. Estates created by implication where land is devised after the death of a person mentioned.</p> <p>467. Estates in fee by implication on attainment of majority from gift over in case of death under age.</p> <p>468. Estate not created in the children as purchasers in case of a devise in fee defeasible on death without children.</p> <p>469. Estates by implication from power of appointment not executed.</p> <p>470. Creation of cross-remainders for life by implication.</p> | <p>§ 471. Estates tail by implication on indefinite failure of issue.</p> <p>472. Remainders by implication after remarriage or death of testator's widow.</p> <p>473. The resulting trust for the heir when land is ineffectually disposed of in trust.</p> <p>474. Devises given beneficially for a particular purpose which fails, and devises in trust, distinguished — No resulting trust in former case.</p> <p>475. Gifts by implication from faulty or erroneous recitals as to ownership of property under other instruments than the will.</p> <p>476. Erroneous recitals to the effect that property has been devised.</p> <p>477. When an erroneous recital will constitute a gift — Misstatement of the amount of legacies given.</p> <p>478. The construction of the word "unmarried."</p> |
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§ 463. **Implication must be of necessity — Necessary implication defined.**— The rule of construction that gifts in a will may arise from implication is well settled, but the implication must be a necessary one. By necessary implication is meant, says Lord Eldon,¹ not natural necessity, but so strong a probability to make the gift that an intention contrary to that which is imputed to the testator cannot be supposed to have been entertained by him. By implication *mere conjecture* is not meant, and devises by implication are not to be favored

¹ In *Wilkinson v. Adams*, 1 Ves. & B. 456, on p. 466.

without reason, in conformity with the rule that a testator is not permitted to disinherit his heir at law unless he shall give the property to others.

On the other hand, the intention of the testator to dispose of his property, if it is ascertainable, must be carried out, and a devise by implication will be permitted for this purpose. So, if a particular devise or bequest in express terms cannot be accounted for, except upon an assumption that the testator also intended to make a corresponding disposition of another portion of his property, or of some previous estate in it, the court, construing the will for the purpose of carrying out the *whole* intention of the testator, will imply a corresponding disposition. Before a devise of any particular piece of property can be raised by implication, it must appear that that property is *not* expressly disposed of; for, if property is expressly disposed of in clear terms, no devise by implication disposing of that property or modifying its express disposition will be recognized. So, too, it should be borne in mind that no estate by implication will be permitted, the nature or limitations of which are contrary to any existing rule of law.¹

¹ *Bowers v. Porter*, 4 Pick. (21 Mass.) 198, 200; *Grout v. Hapgood*, 18 Pick. (32 Mass., 1833), 159, 164; *Walker v. Whiting*, 28 Pick. (40 Mass.) 313, 317; *Metcalf v. First Parish in Framingham*, 128 Mass. 370, 374, 1 Am. Pro. R. 11, 15; *Ferson v. Dodge*, 23 Pick. (40 Mass.) 287, 292; *Boston S. D. Co. v. Coffin*, 152 Mass. 95, 100; *Ridgely v. Bond*, 18 Md. (1861), 433, 448; *Bishop v. McClelland*, 44 N. J. Eq. (1888), 450, 453, 16 Atl. R. 1, 3; *Denise v. Denise*, 37 N. J. Eq. 163, 11 L. R. A. 551; *McCoury v. Leek*, 14 N. J. Eq. 70, 73; *Barnard v. Barlow*, 50 N. J. Eq. 131, 135, 24 Atl. R. 912; *Barlow v. Barnard*, 51 N. J. Eq. 620, 622; *Bradley v. Amidown*, 10 Paige Ch. (N. Y.) 388; *Brewster v. Stryker*, 2 N. Y. 19; *Leggett v. Perkins*, 2 N. Y. 297; *Post v. Hover*, 33 N. Y. (1865), 593, 599; *Rathbone v. Dyckman*, 3 Paige (N. Y.), 9; *In re Vower's Will*, 113 N. Y. 569, 21 N. E. R. 574; *Manigault v. Deas*, 1 Bailey, Eq. (S. C., 1831), 298, 303; *McKeehan v. Wilson*, 58 Pa. St. (1866), 77; *Bartlett v. Patton*, 33 W. Va. 71, 5 L. R. A. 523; *Sir W. Grant in Pullen v. Randall*, 1 Jac. & W. 196; *Cave v. Holford*, 3 Ves. 676; *Brummel v. Protheroe*, 3 Ves. 113, 114; *Upton v. Ferrers*, 5 Ves. 801, 806; *Calthorpe v. Gough*, 3 Bro. C. C. 395; *Towns v. Wentworth*, 11 Moore, P. C. 526; *Abbott v. Middleton*, 7 H. L. C. 68; *Greenwood v. Greenwood*, L. R. 5 Ch. D. 954. See also 11 L. R. A. 185, 10 L. R. A. 816. The doctrine of estates by implication has no reference to deeds. *Dudley v. Mallery*, 4 Ga. 52, 64. Where a testator gave income to trustees for the support of his wife for life, and *after her death for the support of his children* not of age or married, directing it to be divided, on the marriage of his four daughters, between them equally, except one dollar each to his two sons, it was held that no estate by implication would arise for the bene-

§ 464. The effect of the introductory clause of a will in connection with the doctrine of gifts by implication.—The introductory clause of a will, though formal and non-dispositive in character, is not therefore always to be disregarded in construing the will. The rule is that the testator's intention is to be ascertained *from the whole will*. If, therefore, the testator in the introduction expresses an intention of disposing of all his estate, as when he says, "I give and dispose of all my worldly goods," it should be considered.¹ The presumption arises that, having the *disposition of his whole estate in view*, he did not intend to die intestate as to any part of it.² If his subsequent language may be construed in either of two ways, by one of which a *complete* disposition will be made of his whole estate, and by the other only a *partial* disposition will be made, resulting in a partial intestacy, the introductory statement, *pointing to a complete disposition*, ought to be considered, and that sense adopted which will result in a disposition of the whole estate. Hence it follows that language which, in a general or residuary clause, may not alone be sufficiently inclusive to dispose of *all* the property of the testator, may have its meaning enlarged in order to correspond with an intention shown in the introductory clause.³

fit of the issue of a daughter who died before the division took place. *Barlow v. Barnard*, 51 N. J. Eq. 620, 632, 28 Atl. R. 597. The appointment by the testator of a guardian of the estate of his grandson during minority does not make him a trustee by implication. *Post v. Hover*, 83 N. Y. 593. A widow to whom an annuity for life is given by a will, *in lieu of dower and distributive share* in the estate of the testator, she being expressly put to her election by the will, is *not only entitled to her dower*, but to a legacy by implication equal to her share in the personal property under the statute, where she elects to take *against* the will. In *re Vower's Will*, 118 N. Y. 669, 574, 21 N. E. R. 574.

¹ *Ante*, § 296 et seq.; *post*, § 680.

² 2 Black. Com. 379.

³ *Foster v. Smith*, 156 Mass. 379, 383; *Earl v. Grim*, 1 Johns. Ch. (N. Y.) 494, 498; *Ibbetson v. Beckwith*, Cas. t. Talbot, 160; *Crutchfield v. Pearce*, 1 Price, 853, 865, 867; *Right v. Sidebotham*, 2 Doug. 759; *Smith v. Coffin*, 2 H. Black. 444, 450; *Bowes v. Blacket*, Cowp. 285; *Roe d. Kirby v. Holmes*, 2 Wils. 80. "Now there are two modes of reading an instrument. Where one construction destroys and another preserves, it is the rule of law and equity, for it is a rule of common sense which must be supposed common to both sides of Westminster Hall, that you shall rather lean towards that construction which preserves than to that which destroys; and this view (*Ut res magis valeat quam pereat*) ought also to be adopted where the question is not between two rival constructions of the same

§ 465. Estates in fee-simple arising by implication from a personal charge on the devisee.—It is the rule where land is given by will in general and indeterminate language (which ordinarily at common law would only confer an estate for life), and the testator directs the devisee to *pay debts or legacies*, or *a gross sum of money*, to a third person, that the direction to pay enlarges the estate to a *fee-simple by implication*. But this implication arises only where the direction to pay constitutes a personal charge upon the *devisee himself*, and never where it is solely a charge *upon the rents and profits* of the estate, into whosoever hands the estate may go.¹ This implication is based upon the likelihood that if the ordinary presumption were to be applied, by which a life estate only would be created, the acceptance of the estate by the devisee might result in a loss to him in case he should die *before* the income of the estate would equal the amount which he would have to pay personally. For this reason the direction to pay is regarded as creating a fee-simple by implication.² But, on the other hand, a direction to pay, personally imposed upon the devisee of an estate which is explicitly and *expressly for the life* of the devisee, will not enlarge it to a fee.³ And though the question is not of much importance in this country, it may be observed that a personal charge upon a devisee to whom an estate tail is given, either in express terms or by words devis-

word in any instrument, but where the question is between reading the instrument verbally, and literally as it is, and in reading it so, and so supplying words, as to take it in the way in which you have every reason to believe that the maker intended it should stand." *Langston v. Langston*, 8 Bligh (N. S.), 167, 217.

¹ On this, see *ante*, § 401.

² *Korf v. Gerichs*, 145 Ind. 184, 187, 44 N. E. R. 24; *Gardner v. Gardner*, 8 Mason (1823), C. C. 211; *Wright v. Denn*, 10 Wheat. (1825), 204, 281; *McLellan v. Turner*, 15 Ma. 436, 438; *Wait v. Belding*, 24 Pick. (41 Mass.) 129; *Bowers v. Porter*, 4 Pick. (21 Mass.) 198, 203; *Lithgow v. Kava-*

nagh, 9 Mass. (1812), 161, 165; *Jackson v. Bull*, 10 Johns. (N. Y.) 148; *Tanner v. Livingston*, 13 Wend. (N. Y., 1834), 83; *Barheydt v. Barheydt*, 20 Wend. (N. Y., 1838), 576, 581; *Moore v. Diamond*, 5 R. L. 121, 125; *Cro. Eliz.* 204, 379; *Cro. Jac.* 598; *Willes*, 138; *Collier's Case*, 6 Rep. 19. See also § 685.

³ *Gaukler v. Moran* (Mich., 1897), 33 N. W. R. 518; *Den v. Cook*, 7 N. J. Eq. (1823), 41, 45; *Hinkle's Appeal*, 116 Pa. St. 490; *Couch v. Eastham*, 29 W. Va. 784, 8 S. E. R. 23; *Dixon v. Romage*, 2 Watts & S. (Pa., 1841), 142, 144; *Moore v. Diamond*, 5 R. L. 121, 126; *Pryor v. Dunkle*, 2 Wash. C. C. 417; *Willis v. Lucas*, 1 P. W. 474; *Burdett v. Wright*, 2 B. & Ald. 710.

ing the fee over on failure of issue, thus creating an estate tail by implication, will not enlarge it to a fee-simple.¹

§ 466. Estates created by implication where land is devised after the death of a person mentioned.—Where the testator devises land to a person, which is to vest in him *after* the death of another, and the will contains no disposition of the fee-simple of the land *during the life of the latter*, the question arises whether or not a life estate is created by implication. The question here, as elsewhere, is, What was the intention of the testator as regards the disposition of the fee of the land? If he has not expressly disposed of it during the life of the person upon whose death the title will vest, it will descend to the heir, *unless upon the construction of the whole will an estate for the life of that person arises by necessary implication.*

In considering this class of cases we must keep in mind the cardinal rule that the heir is not to be disinherited except by express devise, or by a devise arising from necessary implication, by which the land is given to another. Hence, in cases where land is given to A. after the death of B., this distinction is taken in determining whether B. shall or shall not take a life estate by implication: If A., who is to take the estate after the life of B., is himself the heir of the testator, B. will take a life estate by plain and necessary implication, otherwise the estate would be *hereditas vacans* during B.'s life, for no one else can take it, the heir being expressly excluded. Under such circumstances the presumption that B. is to take a life estate is well nigh irrefutable; for if A., the heir at law, is to take, he would have the land during the life of B. and forever afterwards, which is directly contrary to the clearly expressed intention of the testator.

On the other hand, if A., who is to take the land by devise after the death of B., is *not* the heir of the testator, there is no incongruity or inconsistency in permitting the land *to descend to the heir during B.'s life*. In the former case to permit the land to go to the heir would produce an absurd disposition; while in the latter case a result is reached which may be and

¹ *Lithgow v. Kavanagh*, 9 Mass. 161, & S. (Pa., 1842), 414; *Legatt v. Sewall*, 165; *Willis v. Buch*, 2 Binn. (Pa., 1810), 2 *Vernon*, 551; *Denn v. Slater*, 5 T. R. 455, 461; *De Witt v. Eldred*, 4 Watts 335; *Doe v. Owens*, 1 B. & Ad. 318.

probably was in the contemplation of the testator.¹ The rules above stated are applicable not only in the case of a devise to the heir after the decease of another person, but in the case of a devise to several co-heirs or co-heiresses; as, for example, in the case of a devise to A. and B., who are the daughters of the testator, after the decease of his wife.² The question arises as to the creation of an estate by implication when the testator devises land to A., who is *his heir*, and to B., who is a *stranger*, as tenants in common after the death of C. It has been held that in such a case no estate for life was created by implication in C., for there will be no inconsistency under such circumstances in permitting the heir to take, by descent during C.'s life, the whole of the lands, and an undivided one-half in fee at C.'s death.³ Sometimes it happens that there is an express devise of a particular piece of land to A. *for his life*; and a devise of that particular piece of land and *other lands*, after the death of A., to B. Here it is admitted that A. has an express estate for life, and the only question is, does he also take an estate for life by implication in other lands which are given to another after his decease? The cases on this point are not harmonious,

¹ Year Book 18 H. 7, fol. 17; Wright v. Wyvell, 2 Vent. 56; Dashwood v. Peyton, 18 Ves. 40, 49; Willis v. Lucas, 1 P. W. 474; Horton v. Horton, Cro. Jac. 74, 75; Gardner v. Sheldon, Vaughn, 259, 263; Upton v. Lord Ferrers (1801), 5 Ves. 801, 806; Aspinall v. Petvin, 1 Sim. & St. 544, 550; Roe v. Summerset, 1 Marshall, 592, 5 Burr. 2608; King v. Ringstead, 9 Barn. & Cres. 217, 225; Doe d. Driver v. Bowling, 5 Barn. & Ald. 722, 727; Smartle v. Sclar, 2 Lev. 207.

² Hutton v. Simpson, 2 Vern. 722, 737; Dyer v. Dyer, 1 Mer. 414. See also Willis v. Lucas, 1 P. Wms. 472. A devise of real property to the heir *on the death of the widow* of the testator creates a life estate in *her* by implication, though no estate be given to the wife in express terms. 1 Ventris, 576; 2 Bl. Com. 381; McCoury v. Leek, 14 N. J. Eq. 70, 73; Kelly v. Stinson, 8 Blackf. (Ind., 1847), 387, 391; Rathbone v. Dyckman, 3

Paige Ch. 27. But a direction to pay legacies as soon as possible *after* the death of the widow does not give her a life estate in them, though they are to be paid out of the proceeds of land, *where she also has a legacy*. McCoury v. Leek, 14 N. J. Eq. 70, 73. And see also Holton v. White, 22 N. J. Law, 330, 425; Doughty v. Stillwell, 1 Bradf. (N. Y.) 300; Lovett v. Gillender, 35 N. Y. 617. The testator by giving his residuary personal property, after the death of his widow, to *some* only of his next of kin, does not give her a life estate by implication. Chamberlain v. Springfield, 8 Reports, 466; Id. (1894), 3 Ch. 603.

³ Ralph v. Carrick, L. R. 5 Ch. D. 984, 995, 40 L. T. (N. S.) 505. And see also Blackwell v. Bull, 1 Keen, 176, where the devise was of all the property to be equally divided among the testator's children after the death of his wife, one of the children being the heir at law.

but the majority of them hold that A. does not take an estate for life by implication, and that he is only entitled to the express life estate which the will gives him. The other devisees take an estate, which vests at once in possession, in the balance of the land.¹ The question as to the disposition of land in the case of a devise to A., after the death of B., as between the heir and the person whose death is mentioned, cannot arise where the will contains a residuary clause. Such a clause, expressly disposing of all the land not otherwise devised, comprises the intermediate estate and excludes all necessity for the application of the doctrine of devises by necessary implication; and it is immaterial whether the residuary devisee is the heir or whether he is a stranger.

§ 467. Estate in fee by implication on attainment of majority from gift over in case of death under age.—We must now consider estates in fee which arise by implication from the failure of a limitation over, which is to vest upon the death of the primary devisee during his minority. Suppose the testator has devised land in trust, the income of which is to be applied to the support of A. *during his minority*, and in case he shall die before he attains the age of twenty-one the land is to go to B. absolutely, but the testator has made no express provision disposing of the land in case of A. attaining his majority. The general rule in such cases, equally applicable both to devises and legacies,² is that A. takes an absolute interest, which is wholly defeated by his death *during his minority*, but which becomes absolute and *indefeasible on his attaining the age of twenty-one years*.³ The fact that the person who is the residuary devisee is not the same who is to take upon the death of A. under minority strengthens the implication that A.'s interest is to become absolute as soon as he shall attain majority. In-

¹ Cook v. Gerrard, 1 Saund. 181, 188; Annandale v. Brazier, 5 B. & A. 64, 68; Simpson v. Hornsby, 1 Pra. Ch. 439, 452, 2 Vern. 723; King v. Ringstead, 9 B. & Cr. 217, 225; Drew v. Killick, 1 De Gex & Sm. 266. *Contra*, Aspinall v. Petvin, 1 Sim. & Stu. 544; Attwater v. Attwater, 18 Beav. 330; Davenport v. Coltman, 9 Mees. & Welsby, 481, 12 Sim. 538.

² Vonder Horst v. Vonder Horst, 41 Atl. R. 124 (Md., 1898).

³ Paylor v. Pegg (1857), 24 Beav. 105, 111; Gardiner v. Stevens, 30 L. J. Ch. 199; In re Harrison, L. R. 5 Ch. 408; Boling v. Miller, 133 Ind. 602, 33 N. E. R. 354; Bailey v. Hawkins, 27 Atl. R. 512, 18 R. L. 573; Cassell v. Cooke, 8 S. & R. 290; Frogmorton v. Holliday, 3 Burr. 1618; Doe v. Cundall, 9 East, 400.

deed, it is not necessary, in order that this implication shall be created, that there shall be an express devise over in the event of A.'s death under twenty-one; for the rule holds good where the gift is simply for the maintenance of a person until he shall attain majority, and the testator says nothing more.¹ But this rule that the primary devisee shall take an absolute interest on his attainment of majority is, of course, not applicable where the testator has expressly given him a smaller interest on his majority, or where the gift over is to depend upon another event besides death during minority.²

§ 468. **Estate not created in the children as purchasers in case of a devise in fee defeasible on death without children.**—Where real or personal property is given to a person *absolutely*, but if he should die *without leaving children then over*, the primary devisee takes a common-law fee conditional, which is defeasible on his death without leaving children, though the children, if he leave any, take no estate as purchasers under the will *by implication*. If the first taker shall die leaving children him surviving, by which event the remainder is defeated, they will take by descent from their parent and not as purchasers under the will. He has an estate in fee with full power of disposal, and the only effect of mentioning the children in the will is to indicate the contingency upon which his estate in fee is to be defeated.³

¹ *Newland v. Shephard*, 2 Peere Wms. 194; *Peat v. Powell*, Amb. 387, 1 Eden, 479; *Atkinson v. Pace*, 1 Bro. C. C. 91; *Tunaley v. Roch*, 3 Drew. 720; *Wilks v. Williams*, 2 Jo. & Hem. 125. The same principle applies where the income is to be paid to a legatee until his marriage. *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. R. 50. In the following cases there was a devise over upon death under twenty-one: *Hoskins v. Hoskins*, 9 East, 306; *Cropton v. Davies*, L. R. 4 C. P. 159; *Tomkins v. Tomkins*, 80 L. J. Ch. 199. A gift to A. to educate him, and to go to his family if he dies under twenty-one, gives him an estate in fee by implication as soon as he reaches twenty-one. *Wainwright v. Wainwright*, 3 Ves. 558, 559.

² *Savage v. Tyers*, L. R. 7 Ch. App. 356. A devise to A. *during minority*, in trust to support him as may be required in case of accident or misfortune, and on his death without heirs of his body to others, creates a life estate only in A. on his attaining majority, with a remainder to his children in fee. *Eldred v. Shaw* (Mich., 1897), 70 N. W. R. 545; and compare *Holcomb v. Wright*, 5 App. D. C. 76.

³ *Addison v. Busk*, 14 Beav. 459, 2 DeGex, M. & G. 810; *Knight v. Rugg*, 7 T. R. 822; *Dowling v. Dowling*, L. R. 1 Ch. 612, L. R. 1 Eq. 442; *Barnfield v. Wetton*, 2 Bos. & Pul. 324; *Cooper v. Pitcher*, 4 Hare, 485, 16 L. J. Ch. 24.

Even though the devise is in the first instance to A. (the parent) for and during *his natural life*, but if he *dies without children*, then over, the same rule applies. No estate in remainder arises by implication in the children, and in this case, if the parent dies leaving children, they take nothing by descent from their parent and nothing under the will by purchase.¹ What then is the effect of mentioning the contingency of the death of the first taker, who had only a life interest, without children? Generally the phrase is meaningless, as his having children will not enlarge his life estate into a fee-simple by implication, nor can his death *without* children diminish it. It may seem absurd to assume that the testator intended that the death of the first taker leaving no children should entitle the devisee who is to take a remainder, while the converse, *i. e.*, his death leaving a child, should defeat the remainder without benefiting either parent or child. The courts, accordingly, in the case of a devise for life, with remainder over on death without children, will raise an estate by implication in favor of the surviving children upon slight indications of an intention to that effect.²

§ 469. Estate by implication from a power of appointment not executed.—The doctrine of an estate by implication is applicable to a power of appointment which is to be executed by will in favor of a class. If property is given in general terms to A., with a direction that he shall divide the same by will among his children, a life estate in A. arises by implication; and where property is given to a person *expressly for his life*, and after his death to such children, relations or other classes of persons as he may by will appoint, and the person who has the power to appoint fails to exercise it, the property which was to be appointed will go to the objects of the power in equal shares. They will take by implication the same estate that they would have taken by devise.³ If, however, a gift is made

¹ *Ranelagh v. Ranelagh*, 12 Beav. 200; *Scale v. Rawlins*, (1892) App. Cas. 842, 45 Ch. Div. 299; *Sparks v. Restall*, 24 Beav. 218; *Greene v. Ward*, 1 Russ. 262; *Neighbour v. Thurlow*, 28 Beav. 33; *Wetherell v. Wetherell*, 4 Gif. 51; *Hayton's Trust*, 4 N. R. 54; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. R. 474.

² *Dowling v. Dowling*, L. R. 1 Ch. 615; *Ex parte Rogers*, 2 Mad. 449; *Kinsella v. Caffrey*, L. R. 11 Ir. Ch. 154; *Neighbour v. Thurlow*, 20 Beav. 33; *Lee v. Busk*, 2 D., M. & G. 812.

³ *Brown v. Higgs*, 4 Ves. 708, 8 Ves. 574; *Butler v. Gray*, L. R. 5 Ch. 26; *Kellet v. Kellet*, L. R. 5 Eq. 298; *Cruwys v. Coleman*, 9 Ves. 319; *Walsh*

expressly to persons who are strangers to the power, in default of the exercise of the power no estate by implication arises in the objects of the power.¹ And generally where the appointor has a full discretion whether he shall appoint or not, no estate by implication arises in case of his failure to appoint.²

§ 470. **Creation of cross-remainders for life by implication.**—The question of life estates by implication sometimes arises where lands are devised either directly or in trust to several persons for their joint lives or for their respective lives, without any express provision for a survivorship among them; with a limitation to others upon the death *of all*, and no provision is made for the disposition of the shares of the life tenants who die *before* the time of final distribution. If the devise is to A. and B. for their natural lives, and on the death of *both to others*, and A. dies *before* B., an estate by implication arises in B. for *his* life, for the remaindermen are not to take until the death of both A. and B., and the intermediate interest between the ending of the joint lives of A. and B. and the death of the survivor is not expressly disposed of.³ If the gift is to A. and B. for their *joint lives*, and after *their decease* to others, the necessity for the implication is not manifest, as the words "joint lives" may be a sufficient express manifestation of an intention to create a survivorship between A. and B.⁴

§ 471. **Estates tail by implication on indefinite failure of issue.**—Not only are estates in fee-simple created by necessary implication, but estates in fee-tail are also very frequently based

v. Wallinger, 2 Russ. & My. 78; Forbes v. Ball, 3 Mer. 437; Grievson v. Kirsop, 2 Kee. 653; Jones v. Tarn, 6 Sim. 255; Penny v. Turner, 15 Sim. 368; Alloway v. Alloway, 4 D. & War. 380; Smith v. Floyd, 71 Hun, 56, 24 N. Y. S. 610, and cases cited, §§ 802-804.

¹ Pattison v. Pattison, 19 Beav. 638; Roddy v. Fitzgerald, 6 H. L. Cases, 823.

² In re Eddowes, 1 Dr. & S. 395; Bernard v. Minshull, Johns. 276. See *post*, § 804; Vogler v. Titcomb (Me., 1899), 42 Atl. R. 300.

³ Pearce v. Edmeades, 3 Y. & Coll. 246, 251; Sanson v. Bushnell, 55 N. Y. S. 272, 25 Misc. R. 263; Glover v. Still-

son, 56 Conn. 316 (1888), 15 Atl. R. 752; Loring v. Coolidge, 99 Mass. 91, 101; Bulpley v. Bulpley, 1 Root (Conn., 1789), 78; Dow v. Doyle, 103 Mass. 489, 491; Prescott v. Prescott, 7 Met. (Mass.) 141.

⁴ Townley v. Bolton, 1 My. & K. 148; Cranswick v. Pearson, 31 Beav. 624; Stevens v. Pyle, 28 Beav. 338. Cf. *contra*, Bryan v. Twig, L. R. 3 Ch. 183. A devise "in trust" for A. and B. "during *their* life-time or as long as *they* remain unmarried," and "at *their* death or marriage then over," gives the survivor an estate for his life or until marriage. Lazier v. Lazier, 35 W. Va. 567, 14 S. E. R. 148.

upon the same foundation. Thus, where the testator devises land in fee to A., or, where the rule in Shelley's Case is applicable, to A. for life and after his death to his heirs, and on his death without issue then to another, an estate tail is created by implication. This implication arises wherever the failure of issue is an indefinite failure of issue. The limitation over is then a contingent remainder expectant upon the determination of an estate tail. On the other hand, if the failure of issue is a definite failure of issue, the estate in the first taker is a fee-simple which becomes absolute upon his having issue, and the limitation over is an executory devise. But as this subject is very fully treated in another portion of this work, further elucidation here is not regarded as necessary.¹

§ 472. Remainders by implication after remarriage or death of the testator's widow.—A devise by the testator to his widow for the term of her natural life, but *if she should marry again* then to A. in fee, without any provision for the disposition of the fee after her death in case *she should not marry again*, is a very common form of disposition. In such cases the courts will insert the words "when she dies" or "after her death," and A. will take a vested remainder by implication upon the death of the widow without having remarried.²

§ 473. The resulting trust for the heir when land is ineffectually disposed of in trust.—The rule of construction that the heir at law is not to be disinherited unless the property which would descend to him is expressly or by necessary implication given to some one else is invoked in relation to the

¹ See *post*, §§ 844-853.

² Chappel v. Avery, 6 Conn. (1826), 31; Aulick v. Wallace, 75 Ky. 531, 535; Ferson v. Dodge, 23 Pick. (Mass.) 287, 293; Manderson v. Lukens, 23 Pa. St. (1854), 81; Biddle's Appeal, 69 Pa. St. 190; Luxford v. Cheeke, 3 Lev. 125; Gordon v. Adolphus, 3 Bro. P. C. Toml. 306; Eaton v. Hewitt, 2 Dr. & Sm. 184; Brown v. Hammond, Johns. (English), 210; Underhill v. Roden, L. R. 2 Ch. D. 494. A devise to A. for life but, if she remarry A. to have only a portion or the land which was given for life, and on A.'s

death the remainder in fee in the land to B., does not give an estate to B. for the life of A., when she remarries, in that portion of the land which she forfeits. It goes to the heir at law. Augustus v. Seabolt, 3 Met. (Ky., 1860), 156, 160. A devise to the husband and three daughters of the testatrix so long as any of them shall remain unmarried, and for one year after the marriage of the second daughter, gives them life estates with cross-remainders by implication. Dana v. Murray, 26 N. E. R. 21, 122 N. Y. 604.

creation and carrying out of trusts. If the testator has devised his property in trust for a particular purpose, and it is impossible to carry out the purpose of the testator, either because of the incapacity of the beneficiaries, or because the trust is itself void, as being in contravention of some rule of law, the rule is that the trustee holds the lands devised to him for the benefit of the testator's heir at law. Where the trust itself is void for the purpose named by the testator, equity will imply a resulting trust in favor of the heir at law. This is invariably the case where the property devised in trust consists of the residuary real estate of the testator, or, if the property is not residuary, where it is devised in a will containing no residuary clause.¹ So, too, where land is devised in trust for sale for a particular purpose, which is pointed out in the will, and the accomplishment of that purpose requires the expenditure or a sale of only a portion of the lands, so that when the whole purpose is effectuated there will remain a part of the land unsold, a trust will result in the land unsold for the benefit of the heir, where there is no residuary clause. Thus, for example, if the testator shall devise all his land to be sold in payment of his debts, in case the personal property should prove insufficient, and it happens there is sufficient personal property to pay the debts, a trust will arise to the heir by implication, either in all of the land devised or in so much of it as was not necessary to pay the debts.² The same rule applies where the testator devises land in fee to trustees, but disposes only of a portion

¹Johnson v. Hilfield, 87 Ala. 127; S. & R. (Pa.) 330; King v. Mitchell, 5 Helm v. Darby, 3 Dana (Ky., 1835), 185; Owens v. Conans, 7 B. Mon. (46 Ky., 1847), 152; Drew v. Wakefield, 54 Me. 291; Reed v. Stauffer, 56 Md. 236, 254; Blake v. Dexter, 12 Cush. (Mass.) 559; Buffinton v. Maxam, 153 Mass. 477; Easterbrooks v. Tillinghast, 5 Gray (Mass.), 17, 21; Lusk v. Lewis, 32 Miss. 297; Arnold v. Gilbert, 5 Barb. (N. Y., 1849), 190; Thomas v. Wood, 1 Md. Ch. (1848), 296; Kane v. Gott, 24 Wend. (N. Y.) 641; Huckabee v. Jones, 2 Hawks (9 N. C.), 379; Morrison v. Kennedy, 2 Ired. (N. C.) Eq. 379; Henderson v. Wilson, 1 Dev. (N. C.) Eq. 313; Ellison v. Wilson, 13

S. & R. (Pa.) 330; King v. Mitchell, 5 Peters (30 U. S.), 326; Ford v. Dangerfield, 8 Rich. Eq. (S. C.) 95; Blount v. Walker, 31 S. C. 13, 19 S. E. R. 804; Craig v. Leslie, 3 Wheat. (16 U. S.) 563; Hopkins v. Grimshaw, 165 U. S. 342, 353; Richards' Appeal, 116 Pa. St. 232, 9 Atl. R. 311; Crane's Appeal, 116 Pa. St. 232, 9 Atl. R. 311; Heidenheimer v. Bauman, 84 Tex. 174, 19 S. W. R. 382; Carney v. Kain, 40 W. Va. 758, 28 S. E. R. 650.

²Wych v. Packington, 3 B. P. C. Toml. 44; Robinson v. Taylor, 2 Brown's C. C. 589; Barrs v. Fewkes, 2 H. & M. 60; Berry v. Usher, 11 Ves. 87; Wilson v. Mayor, 11 Ves. 205.

of the equitable interest. In such case the remainder of the beneficial interest undisposed of results to the heir. An illustration of this is a devise of land in trust to A., to pay the net income to B. for his life or during his minority, with no further disposition of either principal or income.¹

§ 474. **Devises given beneficially for a particular purpose which fails, and devises in trust, distinguished**—No resulting trust in former case.—The rule creating by implication a resulting trust in favor of the heir is not applicable, unless there is included within the terms of the trust an estate of inheritance, the beneficial interest in which is neither expressly nor by necessary implication disposed of. Lord Eldon has very clearly pointed out the distinction² between a devise to A. and his heirs of land *charged* with the debts of the testator and a devise to A. and his heirs *in trust* to pay the debts of the testator. In the first class of cases, where the legal estate in fee is given, simply charged with the debts, A. *takes the whole legal and equitable interest in the lands after the payment of the debts.*

The object of the testator, in the language of the chancellor, was to give an estate of inheritance “for the purpose of giving the devisee the beneficial interest subject to a particular purpose.” But where an express trust is created in A. and his heirs *for the purpose of paying the debts of the testator*, it is a devise in trust, and *confined to a particular purpose*, with no intention to give A. a beneficial interest; and when the execution of this purpose does not exhaust the fee, A. and his heirs hold in trust for the heir at law of the testator. The following concise statement of the principle by Lord Chancellor Eldon is worthy of the reader’s attention: “If I give to A. and his heirs all of my real estate charged with my debts, that is a devise for a particular purpose, and nothing more. And the effect of these two modes admits just this difference: The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, *subject* to a particular purpose; the latter is a devise *for* a particular purpose,

¹ *Watson v. Hayes*, 5 My. & Cr. 125; 120 Mass. 524, 541; *Van Nostrand v. Hobart v. Countess of Suffolk*, 3 Vern. Marvin, 44 N. Y. S. 679, 16 App. D. 28. 644, 1 Eq. Cas. Ab. 272; *Bird v. Harris*, L. R. 9 Eq. 204; *Sears v. Hardy*, 272.

² *King v. Denison*, 1 Ves. & B. 260,

with no intention to give him any beneficial interest. Where the whole legal estate is given for the purpose of satisfying trusts expressed, which do not exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But where the whole legal interest is given for a particular purpose, with an intention to give to the devisee the beneficial interest if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given him." The general principle is that, in order that a resulting trust for the heir shall ensue, the land must be devised in trust. It is not necessary that the word "trust" should be used, if the intention to create a trust is plain and unequivocal; but the courts will not favor the creation of trusts from words of request or desire, as when, for example, a testator devises his land to A., desiring her to sell it and give the proceeds to persons named.¹ In some of the earlier cases the fact that the person to whom land is devised is described as a relation of the testator, as, for example, a gift to my cousin or my brother A. for the purpose of paying debts, has been regarded as a circumstance which would rebut a resulting trust in the balance remaining after payment of the debts, and as indicating an intention that A. was to take the balance beneficially;² but at the present time this circumstance would not have much weight. If the devise is to A. and his heirs in trust for a particular purpose, and that purpose is something beneficial to A., as, for example, for his support and maintenance during his life, and the fee is not disposed of, the presumption of a resulting trust, where the language of the will is not clear, would seem to be stronger than where the purpose is not one beneficial to A., for example, where the purpose is to pay the debts of the testator.³

§ 475. Gifts by implication from false or erroneous recitals as to ownership of property under other instrument than the will.—It sometimes happens that a will contains a statement showing or tending to show that the testator be-

¹ *Hess v. Singler*, 114 Mass. (1874), 56; *Spooner v. Lovejoy*, 108 Mass. (1871), 529; *Warner v. Bates*, 98 Mass. (1853), 268; *post*, §§ 792-796.

² *Cunningham v. Mellish*, 1 Eq. Ab. 273, pl. 8, 2 Vern. 247; *King v. Denison*, 1 Ves. & Bea. 360, 274; *Barrs v. Fewkes*, 2 H. & M. 60, 67.

³ *Walton v. Walton*, 14 Ves. 322.

lieved the title to and ownership of property was in a person whose name he mentions, when in fact the property belonged absolutely to the testator. Whether such a statement shall constitute a gift of the property referred to, to the person who is mentioned, depends upon the intention of the testator, to be gathered from the whole will. A recital that another person is entitled to the property under some other instrument than the will is usually regarded merely as an expression of opinion; and where the property referred to actually belongs to the testator, *the presumption is that he did not intend to dispose of it for the benefit of that person.* Thus, where a man describes separate property owned by him as community property,¹ it does not constitute a devise of one-half of it to his wife.² Nor will a statement by the testator that he gave A. *less than B.* because he had made a provision for A. during his life, when he had made *no* provision for him, compel A. to elect between having the property alleged to be given to him and taking what the will gives him.³

¹ *Ante*, § 58.

² *Hatch v. Ferguson*, 57 Fed. R. 966, 971.

³ *Box v. Barrett*, L. R. 3 Eq. 244. The statement as a reason for revoking a devise to A., that the testator had made a gift of nearly the same value to her husband, which was false, does not constitute a gift to the husband. *Mendinhall's Appeal*, 124 Pa. St. 387, 398, 16 Atl. R. 881. See also *Bamfield v. Popham* (1702), 1 P. Wms. 54, 57; *Wright v. Wyvell*, 2 Vent. 56; *Harris v. Harris*, L. R. 3 Eq. 16; *Smith v. Fitzgerald*, 3 Ves. & Bea. 2; *Harris v. Perry*, 68 Fed. R. 43, 52; *Right v. Hammond*, 1 Strange, 427; *Marsh v. Hague*, 1 Edw. Ch. (N. Y., 1831), 174, 181; *Holten v. Den*, 3 N. J. L. 330; *Hurlbut v. Hutton*, 42 N. J. Eq. 15; *Hunt v. Evans*, 11 L. R. A. 185. A statement in a will that the property of the father of the testator would, on the death of the father, devolve by the father's will on B., when in fact it

is a part of the estate of the testator, is not a devise of that property by implication. *Circuit v. Perry*, 23 Beav. 275. A statement that land is devised *subject to the widow's dower and thirds* does not give the widow an estate by implication where the land was not subject to her dower. *Adams v. Adams*, 1 Hare, 527. In this case *Wigram, V. C.*, says: "Where a testator in one part of his will has recited that he has given a legacy to a certain person, but it has not appeared that any such legacy was given, the court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given to the erroneous recital the effect of an actual gift;" though if, on the contrary, "the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, such recital is no evidence of an intention to give by

§ 476. **Erroneous recitals to the effect that property has been devised.**— But a recital which, in clear and unequivocal language, refers to property as *having been devised* in the identical *will which contains the recital*, is some, though not much, evidence of an intention to confer the supposed gift, though the recital of the gift is erroneous. The presumption of an intention to devise, which is created by the recital, may sometimes be regarded as conclusive. The court in such cases may take the recital as conclusive evidence of an intention to give by the will, and may give to the erroneous recital the effect of an actual gift. Such a case is clearly to be distinguished from the cases in which “the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, and in which the recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication.” Thus, if the testator stated that a legacy which he gives is in addition to a prior gift in his will, where there is *no prior gift*, it may be presumed conclusively that he intended to give one, and it will be given by implication.¹ But an erroneous recital, in order to constitute a gift in itself, ought to be clear. If the testator refers to a previous portion of his will as containing a disposition in favor of some person, and he has given nothing in that previous portion of the will for the benefit of that person, the recital, *because there is nothing whatever to answer to it*, may be sufficient evidence of an intention to make a gift which has been omitted, and hence may amount to a gift by implication.

the will, and cannot be treated as a gift by implication.” A devise of all my jewels to the wife of the testator, *except those my wife desired to give her grandson*, does not create a bequest to the grandson by implication. *Upton v. Lord Ferrers*, 5 Ves. 801, 806. A recital in a will that the testator had executed a deed conveying a farm to A., with a bequest to him of all the personal estate as well, the testator further stating, “I thus give to A. all my property because he is married to my niece, and I have been living

with them for many years, and have a high regard and affection for them, and I desire that they shall enjoy the same to the exclusion of my other relatives,” does not constitute a devise of the farm where the deed had, during the life-time of the testator, been set aside, as procured by undue influence. *Zimmerman v. Hafer*, 81 Md. 347, 453, 32 Atl. R. 316.

¹ *Jordan v. Fortesque*, 10 Beav. 259; *Farrar v. St. Catharine College*, L. R. 16 Eq. 24; *In re Jewett*, 5 Misc. R. 557, 25 N. Y. S. 1109.

But where in some previous portion of his will he has given that person something, he may have only meant to describe that previous gift as the motive or reason for his present action.¹ The incorrect description cannot amount to a gift.²

If such is the case, the testator's inaccurate recital of what he has done, unless coupled with words of gift, will not constitute another gift. We ought to be sure that the recital does not refer to the same prior gift before permitting it to raise a distinct gift by implication. Thus, a testator's statement in a codicil that he had, in his will, given A. more than B. because of A.'s greater need of money, does not increase A.'s legacy if by the will B. is to take a larger share than A.³

¹ *Mims v. Macklin* (S. C., 1898), 80 S. E. R. 585.

² The statement in a will that land, which had been devised in a previous will, had been sold, with a gift of the proceeds, is a revocation of the previous devise. *Giddings v. Giddings*, 65 Conn. 149, 82 Atl. R. 334. A gift to A., B. and C., and then another gift to the said "last mentioned" A., B., C. and D., when D. had not been mentioned, is not a devise to D. *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285. A testator gave his cousin "S. M., daughter of D. O., \$1,000 more than the equal part above mentioned to my uncle D. O.'s children," to whom nothing had been given, though by a prior clause the children of seven uncles named, not including D. O., received \$5,000 each. Held, that the children of D. O. took each \$5,000. *Marsh v. Hague*, 1 Edw. Ch. (N. Y., 1831), 174, 183. A statement in a codicil as a reason for a legacy, that the testator had disinherited his heir, when in fact he had given him a large legacy, does not revoke it, but will be disregarded as based upon a mistake of fact. *Mordecai v. Boyland*, 6 Jones (59 N. C.) Eq. 365, 371.

³ *Terry v. Smith*, 42 N. J. Eq. 504, 8 Atl. R. 886. Where a testator gave \$5,000 to A. and the residue to B., and

in a subsequent codicil revoked the bequest to B., stating that he wished to give the \$5,000 which she erroneously stated she had given to B. to C., it was held that the latter constituted a revocation of the bequest to B. with a legacy of \$5,000 to C., but that the gift to A. remained unaffected. *Colville v. Trust Co.*, 10 App. D. C. 56. "The language refers to something as already done; something he had given or supposed he had given. If in the preceding part there was nothing that could in any way answer the description of what he here says he had willed to A., there would be room for the application of the doctrine that a declaration by a testator that he had given something is sufficient evidence of an intention to give it, and amounts to a gift; but the question here is, whether he did not mean to describe, however inaccurately, that which he had before actually given. Without denying that the recital of a gift as antecedently given may amount to a gift, the court ought to see very clearly that there is nothing in the will to which the recital can refer before it is turned to a distinct bequest." By Geo. W. Grant, M. R., in *Smith v. Fitzgerald*, 3 Ves. & B. 2.

§ 477. When an erroneous recital will constitute a gift — Misstatement of the amount of legacies given.— A mere recital will not alone amount to a gift. Thus, if the testator says, out of the £100 which I have bequeathed A., I give B. £50, it is a gift to B., but A. will take nothing by implication, for words of diminution are never to be construed to give a legacy by implication. If, however, it is clear from the recital that the testator intended to give something thereby, the recital, though erroneous, will itself be construed as a gift. Thus, for example, where a testator gives a certain sum which he states that he calculates will make up a sum then specified exactly by him, and the legacy which he gives proves insufficient to make up the amount, the legatee is entitled to the sum specified. Thus, where the testator, after erroneously stating that his wife was entitled under a marriage settlement to a sum which would yield £1,560, gave her £440, intending, as he said, to make her income £2,000, and it was proved that she was not entitled to £1,560, it was held that she should receive under the will as much as would make her yearly income £2,000.¹ A mistaken recital of the amount of a legacy which has been previously given will increase it where the amount is overstated in the recital. Thus, where a testator gave £500 “in addition to £1,500 before bequeathed,” when in fact he had previously given only £1,000, it was held that this constituted a legacy of £2,000.² On the other hand, the amount of a legacy clearly and expressly stated will not be diminished by a subsequent erroneous recital.³ An erroneous recital of a previous legacy or devise which is given in clear terms, misdescribing it as to the amount if in money, or location if in land, will not of necessity revoke it. Thus, if a man gives his estate

¹ Ouseley v. Anstruther, 10 Beav. 459; Milner v. Milner, 1 Ves. Jr. 106, where the testator gave £3,500, “which, with £6,000 she is entitled to by her marriage settlement, and £500 from B., make up £10,000, which I design for her fortune;” and she was entitled to only £5,000 under the settlement. She took £4,500 under the will. See also Trevor v. Trevor, 5 Russ. 24; Ives v. Dodgson, Ir. 9 Eq. 401.

² Jordan v. Fortesque, 10 Beav. 259, 11 Jur. 549; Foörde v. Foörde, 2 Wm. Bl. 698; Edmunds v. Waugh, 4 Drew. 275.

³ In Gordan v. Hoffman, 7 Sim. 379, a legacy of £3,000 was not cut down by a gift in a codicil of “£4,000, in addition to £2,000 given by the will.” See also Barry v. Crundall, 7 Sim. 430 438; Mann v. Fuller, Kay, 624.

in Norwood, in express terms, to A., a mere recital subsequently that he has given that estate to B. is not a revocation.¹

§ 478. **The construction of the word "unmarried."**—The primary and ordinary meaning of the word "unmarried" is "never having been married," and the testator will always be presumed to have used this word in this sense, in the absence of anything to the contrary.² The word "unmarried" will be given its ordinary and primary signification in construing a gift to A. for life or absolutely, but in the case of his death unmarried *and* without issue, then over. Inasmuch as the word "issue" is conclusively presumed to mean legitimate issue, in the absence of anything to the contrary, the event of the devisee leaving issue would, of necessity, imply his having been married. Viewed from this standpoint, and assuming that the word is used in its primary sense, its employment in the phrase "unmarried and without issue" would seem unnecessary and superfluous.³ For this reason the courts have substituted the word "or" for "and" in cases of this class, making the devise over take effect on the death of the devisee never having married *or* on death without issue. The result of this is, taking the word "unmarried" in its ordinary sense, that the devise over is defeated as soon as the primary devisee marries, irrespective of the fact that he dies without issue and without a husband or wife surviving.⁴ Another result of inserting the word "or" for "and" is to reject the word "unmarried;" for if the estate is to go to the remaindermen on the happening of *either event*, the result is the same as if the contingency of death without issue stood alone.⁵

¹ Skerratt v. Oakley, 7 T. R. 492; rymple v. Hall, 50 L. J. Ch. 302 (1881), 16 Ch. D. 715, 716, where there was a devise over if a legatee shall die unmarried. See also Blundell v. De Fable, 57 L. J. Ch. 576, 577, 58 L. T. 621; Day v. Barnard, 1 D. & Sm. 351.

² Norris v. Barber, W. N. (1873), 180; In re Sergeant, L. R. 26 Ch. D. 575, 577; Pratt v. Mathew, 23 Beav. 328; Maughan v. Vincent, 9 L. J. (N. S.) Ch. 329; Heywood v. Heywood, 30 L. J. Ch. 155, 29 Beav. 9, 16. As in Radford v. Willis, L. R. 7 Ch. App. 37, where the devise was to A. for life, remainder to her husband, but if she died unmarried, then over, and A. was unmarried at the date of the execution of the will. So in Dal-

³ Barber v. Pittsburgh R. R. Co., 17 S. Ct. 488 (U. S.).

⁴ Maberly v. Strode, 3 Ves. 450; Bell v. Phyn, 7 Ves. 452, 459; Hepworth v. Taylor, 1 Cox, 112; Wilson v. Bayly, 3 B. P. C. Toml. 195; Mackenzie v. King, 12 Jur. 787, 17 L. J. Ch. 443.

⁵ Chrystie v. Phyfe, 19 N. Y. 344, 351.

But the word "unmarried" is a word of flexible meaning, and is to be construed according to the ascertained intention of the testator. The testator may have meant, in using the word "unmarried," not having a husband or wife at the time. Thus, it has been held that a gift to a woman in case she is unmarried means unmarried at the death of the testator.¹ So a trust for the benefit of unmarried children means those who are unmarried at the death of the testator; and the fact that some of them subsequently marry will not divest the interests of those who do so.²

¹ *Blagrove v. Coore*, 27 Beav. 188.

² *Jubber v. Jubber*, 9 Sim. 503, 507 (1839). Where the bequest was to A. for life, remainder to his children by any future wife, but in case he should die during minority, unmarried and without issue, then over, it was held that "unmarried" meant not leaving a wife surviving, and the devise over was defeated where A., having attained his majority and having married, died without leaving issue. *Everett v. Cooke*, 7 East, 269. In this case Lord Ellenborough said on page 271: "The most rational construction we can give the will is to construe it as Lord Hardwicke did the devise in *Framlingham v. Brand*, as one contingency, namely, B.'s dying an infant, attended with two qualifications, viz: his dying without leaving a wife surviving him, or dying without children. Had he left a wife and died an infant, and no children, the testator might have intended that, in such event, the widow should be benefited by taking her share under the statute of distribution with the next of kin, or that B. should be able to make a testamentary disposition in her favor; mean-

ing, also, that if he left children they should have the estate in preference to the wife; and that if he left neither wife nor children at his death during his minority, C. and his children should have the estate; but that if he arrived at the age of twenty-one, he should have a power to dispose of it, though he left neither wife nor children." See also *Baldwin v. Rawding*, 2 B. & A. 441; *In re Sanders' Trust*, L. R. 1 Eq. 675, 683. In a case where personal property is limited over, if a woman who is married shall die during the life of her husband, to such persons who would be entitled under the statute if she die unmarried, the word "unmarried" will be construed as not having a husband at the time of her death. The effect of construing the word "unmarried," in such circumstances, as not having been married, would be to deprive the children of the marriage, if any survive her, of all benefit, as they would be the persons to take in case she should die intestate and without a husband surviving her. *Maughan v. Vincent*, 9 L. J. (N. S.) Ch. 329, 4 Jur. 452.

CHAPTER XXIII.

DEVICES AND BEQUESTS UPON CONDITION

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| <p>§ 505. Limitations until marriage distinguished from conditions in restraint of marriage.</p> <p>506. The validity of a condition against the remarriage of the widow of the testator.</p> <p>507. The character of the estate taken by the widow of the testator.</p> <p>508. Conditions involving the attainment of majority — Whether the legacy is vested or contingent.</p> <p>509. Conditions that a legatee shall return from abroad or shall claim the legacy within a specified period.</p> <p>510. Conditions requiring a legatee to release claims against the estate of the testator.</p> <p>511. Conditions against disputing the will or interfering with the management of the estate.</p> <p>512. Language constituting a condition against disputing a will.</p> <p>513. What actions constitute a breach of condition against contesting a will.</p> <p>514. Conditions forbidding the litigation of the will are not in contravention of public policy.</p> <p>515. Conditions requiring a legatee to acquire or to maintain residence.</p> <p>516. The validity of a condition involving the assumption of a surname — What acts shall constitute a sufficient performance.</p> <p>517. Conditions that a legatee shall carry on a business.</p> <p>518. Conditions that a legatee shall pursue a prescribed course of study.</p> | <p>§ 519. The illegality of conditions which tend to separate husband and wife.</p> <p>520. Provisions for the support of a wife while living apart from her husband.</p> <p>521. Conditions precedent requiring the possession of good habits by a legatee.</p> <p>522. Conditions against alienating or charging lands devised in fee.</p> <p>523. Conditions creating a partial restraint upon the power of alienation — Alienation except to particular persons may be prohibited.</p> <p>524. Conditions against alienating land during a limited period.</p> <p>525. The validity of conditions restraining the alienation of personal property.</p> <p>526. Conditions involving forfeiture on insolvency — The exemption of property devised from liability for the debts of the devisee with a devise over.</p> <p>527. Estates limited until bankruptcy — The validity of conditions exempting income from liability for the debts of a legatee — Spendthrift trusts.</p> <p>528. The effect of the annulment of the bankruptcy.</p> <p>529. Language constituting a valid protection against liability for the debts of the legatee.</p> <p>530. Trust for the support of a family — How far it may be exempt from the claims of creditors.</p> <p>531. Statutory regulations subjecting the income of a trust fund to the claims of creditors.</p> |
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§ 479. Estates upon conditions defined — Conditions precedent and subsequent. — Before proceeding to consider the

nature of testamentary gifts upon condition, we will state a few of the elementary rules and principles which relate to the creation, operation and determination of such estates. In its most general sense an estate upon condition is an estate which has a qualification attached, by which, upon the happening of a certain event, it is created, enlarged, or destroyed.¹ Estates upon condition are divided into two classes. The first class consists of those upon condition implied, *i. e.*, where the condition attaches to the estate by operation of law; as, for example, a condition that the life tenant shall not commit waste.² The second class comprises those upon condition expressed, *i. e.*, where the condition is created by the instrument creating the estate itself, either in express language or by necessary implication. It is solely with this latter class of conditions, where they are attached to a gift contained in a will, that we are concerned in this work. Again, express conditions are subdivided into *conditions precedent* and *conditions subsequent*.

A condition precedent is a condition which must take place, or which must be performed, before the title to the estate to which it is attached can vest; as, for example, a devise of land to A. on condition that he shall pay a legacy to B.,³ or that he shall have supported the testator during his life. The performance of conditions precedent strictly in accordance with the intention of the testator, as manifested in his will, is always required by the courts; they must be literally performed; and even a court of equity, however hard the case may be, will not vest an estate upon condition precedent, if by reason of a failure to perform the condition, where performance is possible, it will not vest at law.⁴

A condition subsequent is one which operates upon the title to an estate which is already vested in a devisee, and which either limits its duration or defeats it altogether.⁵ Most of the estates upon condition found in wills are estates upon condition subsequent. If the estate is devised in fee, with a direction

¹ 4 Kent, 117; Co. Lit. 201b; 2 Black. Com., p. 155.

² 2 Black. Com., p. 155.

³ 4 Kent, 118; 2 Black. Com., p. 154.

⁴ Popham v. Bamfield, 1 Vern. 79, 83.

⁵ "A condition precedent is one which must be fulfilled before an es-

tate can vest. A condition subsequent is one upon the fulfillment or non-fulfillment of which an estate which vests *in presenti* may be divested." Beach on Wills, p. 407; 2 Redf. 283.

that a devisee shall perform some condition which is by its nature a condition subsequent, the devisee takes the fee absolutely, subject to being defeated by the non-performance of the condition. Until that time he has an estate in fee-simple, which he may convey or devise, and which will descend to his heirs subject to the performance of the condition. It is subject to this condition into whosoever hands it may go, and upon a breach the grantor, or the testator or his heirs, may enter. At common law it was held, as is elsewhere explained,¹ that no one but the grantor or his heirs could enter for breach of condition. But it is now the rule in some jurisdictions that the right of entry may be devised, so that where an estate in fee is given by the testator to A. upon a condition, with a residuary devise to B., that B. will ultimately take the fee in the estate upon the failure of A. to perform the condition.

§ 480. Estates upon condition and estates upon limitation distinguished.—Estates upon condition subsequent must be carefully distinguished from estates upon limitation, which they resemble in many respects. The distinction is an important one, for it is a rule of the common law, which is somewhat relaxed in its application to conditions subsequent attached to testamentary gifts, that a breach of condition cannot be taken advantage of except by the grantor or some person claiming under him.²

The breach of a condition subsequent does not *of itself* terminate the estate upon condition. Until the breach of condition, only the possibility of a reverter and nothing more is in the grantor or his heirs, or in the heirs of the testator, as the case may be. Upon condition broken this possibility of reverter becomes a right of entry, which can be enforced by an entry or through the appropriate action of ejectment. After the breach of condition the only interest in the heirs of the testator is a right of entry, which at the common law, according to a majority of the cases, is neither assignable nor devisable, though it may be released to the tenant of the estate upon condition.³

¹ See § 47.

² *Manifold v. Jones*, 117 Ind. 212, 20 N. E. R. 124.

³ 2 Black. Com., p. 155. "A condition determines an estate after breach upon entry or claim by the

grantor or his heir, or the heir of the devisor. A 'limitation' marks the period which determines the estate without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed

Hence a stranger cannot take advantage of breach of condition subsequent. On the other hand, if the estate given to the first taker is *not* an estate upon condition subsequent, but an estate upon limitation, the estate determines of itself the instant the contingency happens, and the next estate dependent thereon vests at once in the person who has the future expectant interest in the property.

An executory estate to vest upon the termination of an estate upon limitation may be given to a stranger, and, upon the termination of the prior estate will vest in him *at once* without any claim or entry or other action or necessity for action upon his part. Take, for example, the very familiar instance of an estate to the widow of the testator for her life, or *until* she shall marry, and upon her death or remarriage, to A. and B., the children of the testator, in fee. The interest of the widow is an estate upon limitation, and will last for her life if she does not remarry, or until marriage if she does marry. The estate of the children who may be living at her death or when she remarries is a conditional limitation. Not only is it a conditional limitation, but it is a remainder expectant upon a life estate. Indeed it may well be doubted if there is much value in many of the fine-drawn distinctions and subtle reasonings of the common law regarding conditional limitations and estates upon limitation and estates upon condition subsequent. Much of the difficulty of comprehending this subject, which has been increased by the prolix explanations and lengthy discussions of details indulged in by the earlier common-law authorities, will be cleared up if we remember that the distinction between conditional limitations and remainders and executory devises is wholly verbal, and that the rules and principles of law applicable to the creation, vesting and termination of these latter estates are no less applicable because the interest given may be called a conditional limitation and not a remainder, vested or contingent, or an executory devise.¹

contingency the estate first limited comes at once to an end and the subsequent estate arises. A 'conditional limitation' is therefore of a mixed nature, partaking both of a condition and of a limitation, because it defeats the estate previously limited; of a

limitation, because upon the happening of the contingency the estate passes to the person having the expectant interest without entry or claim." *Proprietors of Brattle Sq. Church v. Grant*, 8 Gray, 145.

¹ 4 Kent, Com., 123.

§ 481. **Conditions and trusts distinguished.**—The importance and necessity of distinguishing between an estate *upon condition subsequent* and an estate devised *upon trust* are manifest from the following considerations: If the estate is one upon condition subsequent the breach of it gives the testator and his heirs, or perhaps his devisees,¹ a right of entry on the land, which is a legal right, and which is enforceable only in an action of ejectment in a court of law. If, however, the estate granted is not one upon condition, but upon trust, the proper persons to secure the performance of the trust are not the heirs of the testator, but the beneficiaries of the trust property. And the appropriate *forum* for them to seek redress is a court of equity. Whether, in any particular case, an estate is on condition or in trust, is a question of construction for the court to determine after ascertaining the intention. And though the word “provided,” and similar language, are most appropriate to the creation of conditions, still no technical words are more proper in one case than in the other. The tendency in modern times is to favor the creation of trust estates rather than estates upon condition.

§ 482. **Proper language to use in creating conditions and limitations.**—No technical form of words is required to create a condition. Any language showing an intention, either expressly or by implication, on the part of the testator, that a devisee shall take on condition, is sufficient.² The words often employed in creating a condition are “upon condition;” and this, according to Lord Coke,³ is the most appropriate expression. But even this does not always create an estate upon condition.⁴ The words “provided that,” “so that,” or “if it shall happen,” are usually regarded as equivalent to “upon condition,” and will create an estate upon a condition express, if, from all the will, this appears to have been the intention of the testator.⁵ But in the majority of cases conditions are created by testamentary language which is very vague and indefinite in its character.

¹ *Ante*, § 47.

² 2 Jarman on Wills, p. 505.

³ Co. Litt. 203b, 236b; Portington's Case, 10 Co. Lit. 41b, 42a.

⁴ *Sohier v. Trinity Church*, 109 Mass. 1, 19.

⁵ *Shep. Touch.* 126, 122; *Cro. Jac.* 398; *Moor*, 307; 7 *Rep.* 78; *Moor*, 707; *Cro. Eliz.* 306, 560; *Plowden*, 131.

The distinction between estates upon condition and estates upon limitation is elsewhere pointed out,¹ and it is only necessary in this place to state that an estate upon condition, as distinguished from an estate upon limitation, may be created by words which are *neither clear nor appropriate*. Thus, an estate to A. that he may "*with it support B.*," or "*on his paying*" to B. a legacy, or "*if he shall do*" a certain thing, or "*for the purpose of doing*" something mentioned by the testator, would usually be held to be an estate on condition.² On the other hand, an estate upon limitation is created by a devise to A. "*while,*" or "*so long*" as, he remains unmarried, or "*until* he shall reach his majority," or "*during* minority," or "*to his attainment of majority,*" with a gift over to other persons upon the termination of the estate by reason of the expiration of the period mentioned.³

§ 483. **Rules for determining whether a condition is subsequent or precedent.**—All conditions are either precedent or subsequent. No technical language is exclusively applicable to the creation of either class of conditions as distinct from the other. Whether a condition is precedent or subsequent is always a question of construction for the court to determine, after ascertaining what was the intention of the testator.⁴ This it always to be ascertained from the language of the particular will in question, taking into consideration the testator's intention from the whole will. Very little assistance is to be obtained from a consideration of any particular case, unless the language used in that case is, in every respect, identical with that in the will under consideration. The same words have been held to create a condition precedent or a condition subsequent, according as the context in which they are found has varied their meaning. If it appears that the testator required *something to be done which would occupy time in the doing*, it is likely to be a *condition precedent*; while an act which involves *anything in the nature of a consideration* is more in the nature of a *condition subsequent*.⁵ And generally all that can with

¹ See § 480.

² *Newell v. Town of Hancock*, 35 Atl. R. (N. H.) 258.

³ 4 Kent, Com. 127.

⁴ 4 Kent, 120; 1 Term R. 695; Lord

Eldon, in 2 Bos. & Pul. 295; Marshall, J., in *Finlay v. King*, 3 Pet. 346; 2 Black. Com., p. 154.

⁵ Theobald on Wills, p. 263.

any certainty be said is that if from the clause under construction, or from the whole will, it seems clearly evident that the testator intended that a devisee to whom property is given should *perform some act prior to the vesting of the estate, and without the performance of which it will not vest, the condition is precedent*. Until it is performed the devisee has no title.¹

§ 484. **Examples of conditions precedent.**—A condition that A. shall devote as much of his time and personal attention to business as shall satisfy the trustees of his father's will that he is entitled to receive a legacy;² or that a legatee shall continue to reside with the testator during the life of the latter and shall conduct himself properly;³ that a devisee of a farm shall live on it and cultivate it in a proper manner;⁴ that those to whom legacies are given shall appear within six years and shall prove their identity;⁵ that a charitable corporation

¹ *Wheeler v. Walker*, 2 Conn. (1817), 196; *Bowman v. Long*, 23 Ga. (1857), 247; *Duggan v. Harrison*, 97 Ga. (1896), 738, 25 S. E. R. 387; *Abend v. College*, 174 Ill. 96, 50 N. E. R. 1052; *Jennings v. Jennings*, 27 Ill. 18; *Hoss v. Hoss*, 140 Ind. (1894), 551, 39 N. E. R. 255; *Stark v. Smiley*, 25 Me. 201, 207; *Robbins v. Gleason*, 47 Me. (12 Shep., 1845), 259; *Thomas v. Record*, 47 Me. (1859), 500; *Birmingham v. Lesan*, 77 Me. 494, 497, 1 Atl. R. 151; *Morse v. Hayden*, 83 Me. 227, 19 Atl. R. (1889), 443; *Creswell v. Lawson*, 7 Gill & J. (Md., 1835), 240; *Beall v. Deale*, 7 id. 216; *Horsey v. Horsey*, 19 N. J. Law, 517; *West v. Biscoe*, 6 Harr. & J. (Md., 1825), 468; *Haydon v. Stoughton*, 5 Pick. (Mass.) 528; *Broadstreet v. Clark*, 21 Pick. (Mass., 1838), 389; *Ward v. Ward*, 15 Pick. (32 Mass., 1834), 511; *Taft v. Morse*, 4 Met. (45 Mass., 1842), 523, 525; *Quincey v. Attorney-General*, 160 Mass. 431; *Johnson v. Warren*, 43 N. W. R. (1889), 74, 74 Mich. 491, 497; *Burnett v. Strong*, 26 Miss. (1853), 116, 123; *Cheairs v. Smith*, 37 Miss. (1859), 646, 667; *Smith v. Jewett*, 40 N. H. 530; *Jackson v. Kip*, 8 N. J. L. (1825), 241; *Groves v. Cox*, 40 N. J. L. 40;

Lippincott v. Stottenburg, 47 N. J. Eq. 21, 20 Atl. R. (1890), 360; *Underhill v. Saratoga R. R.*, 20 Barb. (N. Y. 1855), 435; *Tompkins v. Elliott*, 5 Wend. (N. Y.) 496; *Barruso v. Madan*, 2 Johns. (N. Y.) 145, 149; *Parmelee v. O. & S. R. R.*, 6 N. Y. (1851), 74; *McCall v. McCall*, 161 Pa. St. 412, 29 Atl. R. (1894), 63, 64; *Wahl's Estate*, 8 Pa. Co. Ct. R. 309; *Clapp v. Clapp*, 6 R. I. (1859), 129; *Burdis v. Burdis*, 30 S. E. R. (Va., 1898), 462; *Barker v. McLeod*, 79 Wis. 534, 48 N. W. R. 657; *Merrill v. College*, 74 Wis. 415, 417; *Ward v. N. Eng. Screw Co.*, 1 Cliff. C. C. 565; *Fenwick v. Chapman*, 9 Pet. (34 U. S., 1835), 461.

² *Seeley v. Hincks*, 65 Conn. 1, 31 Atl. R. 533; *post*, § 521.

³ *Tilly v. King*, 13 S. E. R. 936, 109 N. C. 461; *Den v. Messenger*, 33 N. J. L. (1869), 499; *West v. Moore*, 37 Miss. 114; *Rushmore v. Rushmore*, 59 Hun. 615.

⁴ *Whitesides v. Whitesides*, 28 S. C. 325 (1887), 5 S. E. R. 816; *Marston v. Marston*, 47 Me. 495.

⁵ *Campbell v. McDonald*, 10 Watts (Pa.), 179; *post*, § 509.

shall change its name;¹ that a legacy shall be paid to a legatee provided that he shall attain his majority or shall marry;² that land or other property, which is devised in indefinite language, shall be sold if the income proves insufficient for the support of a legatee;³ that a devisee shall pay the debts of the testator, or a legacy given by the testator, before he shall be permitted to take possession;⁴ that he shall execute a mortgage to secure their payment before taking the land;⁵ that a legatee, who is dissipated and indolent, shall reform and settle down, or shall devote his attention to business, *before* his legacy shall be paid to him;⁶ that a legatee shall support the testator and his wife during their lives;⁷ that a legatee shall marry only with consent;⁸ that he shall marry in a certain family, and have a son, but if he shall not marry then to others;⁹ and that the legatee shall release to the executor of the testator certain claims which he has against the testator,¹⁰ are conditions precedent.¹¹

¹ *Merrill v. Wisconsin College*, 74 Wis. (1889), 415, 43 N. W. R. 104; *post*, § 516.

² *In re Rogers*, 94 Cal. 526 (1892), 29 Pac. R. 962; *post*, § 508.

³ See §§ 687, 688.

⁴ *Fuller v. Fuller*, 24 Atl. R. 946, 84 Me. 475; *Moore v. Perry*, 20 S. E. R. 200, 205, 43 S. C. 200.

⁵ *Laurens v. Lucas*, 6 Rich. (S. C.) Eq. 217.

⁶ *Classen v. Kennedy*, 85 N. E. R. 738, 147 Ill. (1893), 660; *Weakley v. Buckner*, 91 Ky. 457 (1891), 16 S. W. R. 130; *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. R. 422; *post*, § 521.

⁷ *Irvine v. Irvine* (Ky., 1890), 15 S. W. R. 511.

⁸ *Reves v. Herne*, 5 Vin. Abr. 343, pl. 41; *post*, § 496.

⁹ *Randall v. Payne*, 1 Bro. C. C. 55.

¹⁰ *Den v. Hance*, 11 N. J. L. (1830), 244; *post*, § 510.

¹¹ "It is certainly well settled that there are no technical and appropriate words which always determine whether a devise be on condition precedent or subsequent. The

same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is of course precedent, and unless it be performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent. . . . It is a general rule that a devise in words of the present time, as: 'I give to A. my lands in B.' imports, if no contrary intent appears, an immediate interest, which vests in the devisee on the death of the testator. It is also a general rule that if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance." By Chief Justice Marshall, in *Finlay v. King*, 3 Pet. (U. S.) 846.

§ 485. **What shall constitute conditions subsequent.**— A condition subsequent is one which is to be performed by a devisee or legatee *after the vesting of the estate*, the non-performance of which is to put an end to the estate so far as he is concerned. If the testator shall dispose of real or personal property to A. in terms which will vest the absolute title in him, and shall direct that thereafter he shall perform some act, the performance of this act may be a condition subsequent, the non-performance of which will prevent the retention of the vested title by the devisee. Thus, where the testator devises land for a charitable purpose specifically mentioned, the strict application of his bounty to the purpose indicated by him, and to that alone, by the corporation to which the fund has been given, is a condition subsequent.¹ So a legacy to a church to be enjoyed by it so long as it maintains the present doctrine and principles of faith and practice,² to a devisee on condition that he shall keep the homestead of the testator in repair,³ and a direction that a devisee shall remain on the land devised and cultivate it in a proper manner, are conditions precedent.⁴ But, on the other hand, if the devise is in express terms to a person, *provided he shall attain the age of twenty-one*, his attainment of that age is a condition precedent to the vesting of the property.⁵ But in some cases it has been held that a devise of land to A. when he shall attain his majority, with a disposition of the land to another person in the interval, does not constitute the attainment of majority a condition precedent, but that the devise to him is a vested remainder after the particular estate in the first taker.⁶

§ 486. **The strict performance of conditions precedent is required.**— A condition precedent to the vesting of an estate must be *strictly and wholly complied with in every particular*, before the estate shall vest.⁷ If the performance of a condition precedent requires the doing of several acts to complete it, all

¹ *Stark v. Smiley*, 25 Me. 201, 207; (N. Y.) 392; *Bowman v. Long*, 23 Ga. Hayden v. Stoughton, 5 Pick. 528; 247. See also § 508.

Chearis v. Smith, 37 Miss. 646, 647.

² *Princeton v. Adams*, 10 Cush. 129.

³ *Tilden v. Tilden*, 13 Gray (Mass.), 103.

⁴ *Lindsey v. Lindsey*, 45 Ind. 552.

⁵ *Kelso v. Cumming*, 1 Redf. Sur.

⁶ *Collins' Will*, 40 Mo. 287; *Johnson v. Valentine*, 4 Sandf. (N. Y.) 36; *Hathaway v. Leary*, 2 Jones Eq. (N. C.) 264; *Rivers v. Trippe*, 4 Rich. Eq. (S. C.) 276; *post*, § 508.

⁷ *Rogers' Estate*, 29 Pac. R. 963

must be performed before the estate will vest.¹ The fact that the devisee is not at fault for the non-performance of the condition precedent required, because he must do some act which he is incapable of performing, is immaterial.²

So far as conditions subsequent are concerned, it may be said that the rule which holds that an estate once vested shall not be divested without clear reason is applicable. Conditions subsequent are construed against the person who is to take advantage of them, and in favor of the person whose estate they are to defeat. It is generally required, where the contingency of the condition subsequent which is to defeat the estate consists of several particular acts or occurrences, that all shall concur before the estate is divested.³

§ 487. The period within which a condition subsequent must be performed.—Whether a condition subsequent must be performed within *a reasonable period after the vesting of the estate*, or whether the devisee shall have *his whole life to perform it*, is often difficult to determine. No question as to the period within which a condition subsequent must be performed can arise where the testator has expressly indicated the length of time which the devisee shall have for its performance. But

(1892), 94 Cal. 526; *Rockwell v. Swift*, 20 Atl. R. (Conn.) 200; *Bowman v. Long*, 23 Ga. (1857), 247; *Abend v. College*, 174 Ill. 96, 50 N. E. R. 1052; *Nevius v. Gourley*, 95 Ill. 206, 214, 1 Am. Pro. R. 53, 57; *Richards v. Richards*, 58 N. W. R. 926 (1894), 90 Iowa, 606, 611; *Irvine v. Irvine* (Ky., 1892), 15 S. W. R. 111; *Robbins v. Gleason*, 47 Me. 267; *Leader v. O'Loughlin*, 80 Me. 47, 49, 12 Atl. R. 787; *Cresswell v. Lawson*, 7 Gill & J. (Md., 1835), 240; *Robertson v. Mowell*, 66 Md. (1887), 565, 567, 10 Atl. R. 671; *Weston v. Foster*, 7 Met. (Mass.) 297, 299; *Hayden v. Stoughton*, 5 Pick. (Mass.) 528; *Hyde v. Baldwin*, 17 Pick. (Mass.) 303; *Johnson v. Warren*, 74 Mich. 491, 497, 42 N. W. R. 74; *Burnett v. Strong*, 26 Miss. (1853), 116; *Den v. Hance*, 11 N. J. L. 244; *Frederick v. Gray*, 10 S. & R. (Pa.) 182, 186; *Baruso v. Madan*, 2 John. (N. Y.) 145, 149; *Johnson v.*

Gooch, 116 N. C. 64, 65, 21 S. E. R. 39; *Martin's Estate*, 178 Pa. St. 416, 35 Atl. R. 98; *Whitesides v. Whitesides*, 28 S. C. 325, 331, 5 S. E. R. 816; *Moore v. Perry*, 20 S. E. R. 200, 205, 42 S. C. 369, 373; *Merrill v. Wisconsin Female Col.*, 74 Wis. 415, 417, 43 N. W. R. 104; *Vanhorne v. Darrance*, 2 Dall. 317; *Harvey v. Aston*, 1 Atk. 361; *Heynisch v. Martin*, 3 Atk. 330; *Fry v. Porter*, 1 Ch. Cas. 138; *Bertie v. Falkland*, 3 Ch. Cas. 129.

¹ *Nevius v. Gourley*, 95 Ill. 206, 214; *Vanhorne v. Darrance*, 2 Dall. 317.

² *Johnson v. Warren*, 74 Mich. 491, 497, 42 N. W. R. 74.

³ *Hooper v. Cummings*, 45 Me. 357, 359; 4 Kent, Com., p. 125; *Clavering v. Ellison*, 3 Drewry, 451, 7 H. L. Cases, 707; *Bean v. Griffiths*, 1 Jur. (N. S.) 1045; *Longdale v. Briggs*, 8 De Gex, M. & G. 429, 430.

where he has not indicated it, or, where he has attempted to indicate it, but his language is so vague that the court cannot ascertain his intention, a choice between alternatives must be made, and the devisee must be required either to perform it within a reasonable time or he must be given his whole life to perform it.

The question has most frequently arisen where the condition subsequent has been the assumption of a surname by the devisee, or marriage into a family. The supreme court of the United States¹ and the English courts have held² that the devisee had his whole life to assume the name; but other authorities hold that such a condition subsequent must be performed *within a reasonable time*, the length of which in each case depends upon the character of the act to be performed and the particular language of the will under consideration.³

§ 488. **The result of the impossibility of performance or illegality of conditions attached to devises.**—The law distinguishes between conditions subsequent and conditions precedent which are impossible of performance or which are illegal. Conditions which are impossible of performance at the date of the execution of the will, or which afterwards become so by the act of God or the testator, are void.⁴ If a condition is precedent and is impossible of performance, either because the act which constitutes performance has already been performed, or because its performance would be illegal or contrary to public policy, the devise is absolutely void.⁵ Where a condition sub-

¹ *Finlay v. King*, 3 Pet. (28 U. S., 1830), 346.

² *Gulliver v. Ashby*, 1 W. Bl. 607; 4 Burr. 1929, 1940; *Lowe v. Manners*, 5 B. & A. 917.

³ *Carter v. Carter* 14 Pick. (Mass.) 424; *Ross v. Tremain*, 2 Met. (Mass.) 495; *Drew v. Wakefield*, 54 Me. 291; *Moore v. Perry*, 42 S. C. 369, 373, 20 S. E. R. 200. As to what amounts to a change of name, see *Davies v. Lowndes*, 2 Scott, 67; 1 Bing. N. C. 597; or to marriage into a family, *Randall v. Payne*, 1 Bro. C. C. 55, within a reasonable time.

⁴ 2 Black. Com., p. 156.

⁵ Co. Lit. 206b. Conditions are sub-

divided into four classes: *1st*, those which are possible of performance at the time of their creation, but which afterwards become impossible of performance through some act of God or of the testator; *2d*, those which are impossible of performance at the time of the creation of the estate; *3d*, those which are illegal, being against the law or against public policy; *4th*, those which are repugnant to the character of the estate granted. Butler's note to Co. Lit. 206a; 2 Black. Com., p. 156; Shep. Touch. 132, 123; *Roundel v. Curren*, 2 B. C. C. 67; 1 Sw. 383, n.

sequent is impossible of performance, it is void both as regards devises at common law and legacies in the ecclesiastical courts. This is the rule where a condition is impossible of performance at the time of making it, or where it was illegal at that date; and though it is legal and possible of performance at the date of the execution of the will or at the death of the testator, yet, if subsequently it becomes impossible to be complied with without fault on the part of the testator, either by the act of God or operation of the law, it is absolutely discharged, and the devisee takes the estate free from it.¹

Accordingly where there is a devise upon condition that the devisee shall marry a person mentioned,² or that the devisee shall not marry without the consent of a person,³ or a condition that the devisee shall educate⁴ or support a person during his life,⁵ or land is given subject to a condition that the devisee shall settle and reside on it,⁶ and the person mentioned dies during the life-time of the testator, the condition, being subsequent, is absolutely discharged, and the devisee takes the land absolutely.⁷ The rule which applies where the performance of a condition, whether subsequent or precedent, is impossible, is also applicable where the performance of the condition would be illegal. If the illegal condition is precedent the devise is void.⁸ If the illegal condition is subsequent, the testamentary gift, whether it consists of real or personal property, is discharged of the condition, and the beneficiary takes it absolutely.⁹ And though, in the case of a legacy, a distinction is

¹ *Jones v. Bramlet*, 1 Scam. (3 Ill., 1836), 276; *Howe v. Howe*, 152 Ill. (1894), 252, 88 N. E. R. 1083; *Bryant v. Dungan*, 92 Ky. 627, 18 S. W. R. 636; *Birmingham v. Lesan*, 77 Me. 494, 498, 1 Atl. R. 151; *Calkins v. Smith*, 41 Mich. (1879), 409; *Bullard v. Shirley*, 158 Mass. (1891), 559, 560; *Hoss v. Hoss*, 140 Ind. 551, 39 N. E. R. 255; *Madigan v. Burns* (N. H.), 29 Atl. R. 454; *Burnham v. Burnham*, 79 Wis. (1891), 557, 48 N. W. R. 661; *Burleston v. Whitley*, 97 N. C. 265, 2 S. E. R. 450; *United States v. Arredondo*, 6 Pet. (U. S.) 691; *Strathmore v. Vane* (1896), 1 Ch. 507; *Aislabie v.*

Rice, 8 Madd. 256; *Walker v. Walker*, 2 D. F. & J. 255, 29 L. J. Ch. 856.

² *Thomas v. Howell*, 1 Salkeld, 170.

³ *Collett v. Collett*, 35 Beav. 312; *Dawson v. Massey*, L. R. 2 Ch. D. 753.

⁴ *Merrill v. Emery*, 10 Pick. (Mass.) 507.

⁵ *Parker v. Parker*, 123 Mass. 584.

⁶ *McLachlin v. McLachlin*, 9 Paige Ch. (N. Y., 1842), 534.

⁷ If a condition subsequent is impossible to be performed because of the lunacy of the devisee, it is discharged. In *re Bird*, *Bird v. Cross*, 8 Rep. 326.

⁸ *Shep. Touch.* 132, 133.

⁹ See cases cited in § 489.

made between conditions which call for the performance of an act which is *malum prohibitum*, and those which call for the performance of an act which is *malum in se*, no distinction is made at the common law as regards gifts of real estate.¹

§ 489. **Impossible and illegal conditions attached to legacies.**—In England the ecclesiastical courts had formerly exclusive jurisdiction of wills of personal property. In consequence of this, the rules regulating that species of property often differ from the rules of the courts of common law regulating devises. Thus, the ecclesiastical courts adopted a rule which was followed by courts of equity, that if a condition precedent attached to a legacy was originally either impossible of performance,² or became so by the act of the testator,³ the condition was void, and the legatee took the legacy absolutely. If, however, the impossibility of the performance of the condition was not known to the testator when he made his will,⁴ or if the performance of the condition was then possible, but subsequently became impossible by reason of some act over which the testator had no control,⁵ its performance cannot be dispensed with, and as it can never be performed the legacy fails.⁶

As regards the performance of illegal conditions which were attached to legacies, the rule of the ecclesiastical courts, differing from the courts of common law, was as follows: If the performance of a condition precedent involved the doing of an act which was merely *malum prohibitum*, it was disregarded and the legacy vested absolutely.⁷ But if the performance of

¹ Wms. Ex'rs, 1372; 2 Redfield on Wills, 285; 1 Story's Eq. Juris, § 291. In England a condition requiring residence is invalid under the statute permitting the life tenant to sell the estate. Paget's Estate, L. R. 30 Ch. D. 161, 55 L. J. Ch. 42, 53 L. T. 90, 35 W. R. 898.

² Cullin's Appeal, 20 Pa. St. 243; 1 Eden, 115, 116.

³ Dailey v. Langworth, 8 B. P. C. Toml. 359.

⁴ 1 Swinh., pt. IV, § 6, pl. 8, 9.

⁵ Lowther v. Cavendish, 1 Eden. 99; 1 Roper on Leg. 755; Priestley v. Holgate, 3 K. & J. 286.

⁶ Where the testator directed his

executor to pay a sum of money to a legatee at the age of thirty, if he should think it prudent to do so, and the person named reached the age of thirty prior to the death of the testator, the condition being impossible of performance in the terms specified by the will, and being a condition precedent to the vesting of the legacy, the bequest is void. Stark v. Conde, 76 N. W. R. 600 (Wis., 1898).

⁷ Cheairs v. Smith, 37 Miss. 646, 667; Weatherby v. Weatherby, 13 S. & M. 685; Lusk v. Lewis, 32 Miss. 297; Wms. Ex'rs, 1372; Roper on Leg. 756; 1 Swinh., pt. IV, § 6, pl. 16.

a condition precedent involved the doing of an act which was *malum in se*, the legacy was absolutely void.¹

§ 490. The waiver of a performance of a condition.—A condition that A. shall do a certain thing by which B. is to receive a benefit may be waived by B. accepting some other act as an equivalent thereof. Thus a legatee, to whom another legatee is directed to pay money, may take the note of the latter as a full performance.² The testator may by his actions waive the performance of the condition, as in the case of a condition that a legatee shall not marry without the consent of trustees, and the legatee marries in the life-time of the testator with his consent.³ In a case where the testator made it a condition that a legatee should not dispute the will of another person, and during his life-time entered into a compromise by which the will was partially set aside, the performance of the condition was waived, having been made impossible.⁴

§ 491. Conditions which are void because repugnant to the nature of the estate devised.—A condition subsequent which is repugnant to the nature of the estate devised will be disregarded and the devisee will take absolutely.⁵ The condition is absolutely void, and the devisee will take the property discharged from it. A man cannot give property absolutely, and at the same time provide that it shall not be enjoyed or disposed of according to law.⁶ A condition attached to a devise of the legal title to the fee-simple that the devisee shall not commit waste upon the land, or that he shall not enjoy or expend its rents and profits; that the husband shall not have his curtesy, or the widow her dower, in the legal estate;⁷ that the devisee shall not sell or mortgage the land, or that he shall not lease it, is void. These incidents are, by the rules of law, inherent in every estate in fee, and these rules are as binding upon the testator as upon other men.⁸

Whether a condition that land devised shall not be culti-

¹ *Brown v. Peck*, 1 Eden, 140; *Harvey v. Aston*, Comyn's R. 738; 1 Roper on Leg., p. 755.

² *Nevius v. Gourley*, 95 Ill. 206, 214.

³ See § 501.

⁴ *Violett v. Brookman*, 26 L. J. Ch. 308, 311; *ante*, § 489.

⁵ 2 Black. Com., p. 156.

⁶ By Jessel, M. R., in *re Wilcock's Will*, L. R. 1 Ch. D. 229.

⁷ *Portington's Case*, 10 Rep. 36; *Mildmay's Case*, 6 Rep. 40.

⁸ 4 Kent, Comm. 126; *Mildmay's Case*, 6 Co. 40, Litt. 360, Co. Litt. 206b, 223; *Stukely v. Butler*, Hobart, 168. A devise in fee to a woman on

vated or employed in a particular manner is valid depends upon the nature of the estate granted. To attempt to limit the use which a devisee may make of the fee which is given him is repugnant to the estate granted. This rule is illustrated by that very numerous class of cases in which an absolute interest in land or personal property is given, with a provision that "what remains" shall go to others on the death of the primary devisee. It is believed that in no case where the first taker has an absolute interest would the devise over be regarded as a condition limiting the use or disposal of the property in the hands of the first taker.¹ On the other hand, no rule prevents a testator from *devising a life estate* upon condition that the life tenant shall cultivate it in a proper manner, with a devise to others in case he fails to do so; and while this latter disposition of property may be regarded rather as an estate upon limitation than as a condition, the difference is immaterial except so far as the rights of the parties who are to enforce it are concerned. The condition that land shall not be cleared has been held valid, though plainly against public policy as tending to discourage agricultural pursuits.²

§ 492. **The effect of the ignorance of a legatee as to the existence of a condition.**—The ignorance of a legatee of the existence of a condition which is attached to his legacy will not protect him, either in law or in equity, from a forfeiture

condition that her husband shall have no curtesy therein was overruled in *Bevis's Trust*, 20 W. R. 359, 26 L. T. (N. S.) 239; *Haight v. Hall*, 74 Wis. 132; *Mullany v. Mullany*, 4 N. J. Eq. 16, 21; *Goodell v. Brigham*, 1 Bos. & Pul. 192. A condition that a devisee of land given in absolute terms shall, when he sells it, pay a portion of the proceeds to another, is void. *Kelly v. Elliott*, 65 L. J. Ch. 753, 75 L. T. 138, 44 W. R. 632; *In re Elliott* (1896), 2 Ch. 353. A condition to a devise in fee-simple that a devisee shall assume a name is void. A remainder over on breach of this condition will fail, as it is repugnant to the devise of the fee. *Musgrave v. Brooke*, L. R. 26 Ch. D. 792, 33 W. R. 211.

¹ *Post*, § 689.

² *Smith v. Clark*, 10 Md. (1856), 186. *Cf. Stansbury v. Hubner*, 78 Md. (1894), 228, 231. So authorities may be found which hold that where freedom was devised to slaves while slavery was a legally established southern institution, with a condition that they should leave the state in six months (*Forward v. Thamer*, 9 Gratt. (Va.) 537), or that their children should continue slaves, the gift of liberty was absolute. *Fulton v. Shaw*, 4 Rand. (Va., 1827), 597; *Williams v. Ash*, 1 How. (42 U. S.) 1. But it seems that a condition restricting the alterations which may be made in a building may be valid. *Gray v. Blanchard*, 8 Pick. (Mass.) 284.

arising from his failure to perform it.¹ If the condition is precedent the legacy is lost to him by his failure to perform it, though it was absolutely impossible because of his ignorance of its existence for him to do so, and although as soon as he has acquired a knowledge of the condition he at once performs it.² Thus, where a condition precedent to the payment of a legacy is that it shall be claimed by the legatee within three months after the death of the testator, and he fails to claim it for several years because he has not been notified of its having been given, he forfeits it.³ But the rule that ignorance of a condition precedent does not excuse its non-performance is not applicable to the heir of the testator who is a devisee of an estate on condition. His failure or neglect to perform the condition will be excused if it is shown that he did not have actual notice of its existence.⁴

§ 493. The jurisdiction of the English ecclesiastical courts over conditional legacies in restraint of marriage.—The rule of law by which conditions restraining marriage, whether precedent or subsequent, so far as they are attached to legacies, are void, owes its origin to the fact that the ecclesiastical courts in England had exclusive jurisdiction of wills of personal property.⁵ The judges of these courts, from the earliest times, were more familiar with and favored rather the rules and principles of the canon and Roman civil law than the rules of the common law of England. Hence, when they were called upon to determine the validity of conditions attached to legacies,

¹ *Porter v. Fry*, Vent. 199; *Astley v. Essex*, L. R. 18 Eq. 290.

² *In re Hodge's Legacy*, L. R. 16 Eq. 92; *Merrill v. College*, 74 Wis. 415, 417.

³ *Powell v. Rawle*, L. R. 18 Eq. 243; *Tulk v. Houlditch*, 1 Ves. & B. 248; *Burgess v. Robinson*, 3 Mer. 7; *Davis v. Angell*, 81 Beav. 228; *Chauncey v. Graydon*, 2 Atk. 616, 619. See *post*, § 509. In *Livingston v. Gordon*, 84 N. Y. (1881), 136, money was left to a charitable institution so long as it should care for A., who was an inmate at the execution of the will, upon a condition that if the asylum should cease to exist the money

should go to any other institution who would care for A. Being ignorant of the condition, the institution expelled A. during the life-time of the testator, but on learning of it offered to care for him, but he refused. The court held this a sufficient performance of the condition, excused the expulsion, and held A.'s refusal to return immaterial,—a very extraordinary decision.

⁴ *Doe d. Kedrick v. Beauclerk*, 11 East, 657, 667; *Taylor v. Crisp*, 8 Ad. & Ellis, 778; *Murphy v. Broder*, 9 Ir. C. L. 123.

⁵ 3 Black. Com., p. 94.

they applied the principle of the Roman civil law, "*quod in fraudem legis ad impediendas nuptias scriptum est, nulla vim habet*,"¹ by which all conditions of whatever sort in restraint of marriage were absolutely void, with little thought as to the diverse social conditions which existed under the two systems of law. The English courts of equity and of common law, when required to determine the validity of similar conditions in restraint of marriage contained in contracts or marriage settlements, had presented to them prior adjudications of the ecclesiastical courts by which such restrictions were pronounced void in the case of legacies. Though the courts of common law and of equity looked with disfavor upon these decisions, they could not at once repudiate them. The process of repudiation was gradual. The first step in setting aside the rules of the Roman law was to ascertain if there was a gift over on the breach of the condition in restraint of marriage; and, though the fact that there was such a gift over did not always render the condition valid, it was presumed to show a strong intention that the condition was not to be *in terrorem* only, and the condition was frequently, for that reason alone, held to be valid.

So far as conditions in restraint of marriage attached to devises of real property were concerned, many were sustained by the courts of common law, and these courts also distinguish between conditions against marriage attached to legacies where they are precedent and where they are subsequent. The one class is sustained, the other is repudiated.²

¹ Story, Equity, sec. 276.

² In the case of *Stackpole v. Beaumont*, 3 Ves. Jr. 89, Lord Rosslyn said on page 96: "In deciding questions that arise upon legacies out of land, the court very properly followed the rule (that the common law prescribes and common sense supports) to hold the condition binding where it is not illegal. When the rule comes to be applied to personal estate, the court felt the difficulty, upon the supposition that the ecclesiastical court had adopted a positive rule from the civil law upon legatory questions, and the inconvenience of proceeding

by a different rule in the concurrent jurisdiction in the resort to this court. . . . Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the ecclesiastical court is impossible to be accounted for, but under this circumstance: that in the unenlightened ages, soon after the revival of letters, there was a blind, superstitious adherence to the text of the civil law. They never reasoned, but only looked into the books, and transferred the rules, without weighing the circumstances, as positive rules

§ 494. **The considerations of public policy appertaining to conditions in general restraint of marriage.**—Though in some respects, and at first glance, the rule of the Roman civil law did not meet with a very favorable reception in the English courts of law, the manifest advantage of such a rule is apparent. The jurisprudence of England, though hesitating to adopt a legal principle the value and importance of which increased in proportion as the demands of an increasingly complex social existence tended to encourage celibacy by rendering the struggle for a livelihood fiercer and more difficult, did not hesitate to adopt it as modified, to conform to other changes which had taken place in society. The preservation and protection of the family and the interests of morality imperatively demand that marriage shall be encouraged. Any principle of law which tends to the deterioration of public morals, or which encourages improper and meretricious relations between the sexes, is not only subversive of morality, but is destructive of the fundamental principles upon which modern civilized society is based. In view of these and similar considerations it is indisputable that the rule abrogating as illegal all conditions in general restraint of marriage is based

to guide them. It is beyond imagination except from that circumstance, how in a Christian country they should have adopted the rule of the Roman law with regard to conditions as to marriage. First, where there is an absolute unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law where divorce is not permitted. Next, the favor to marriage, and the objection to the restraint of it, was a mere political regulation applicable to the circumstances of the Roman empire at that time, and inapplicable to other countries. After the civil war the depopulation occasioned by it led to habits of celibacy. In the time of Augustus, the Julian law, which went too far, and was corrected by the *Lex Papia Poppæa*, not only offered encouragement to marriage,

but laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy, and for the encouragement of all persons who would contract marriage, it necessarily followed that no person could act contrary to it by imposing restraints contrary to the law. . . . It is difficult to apply that to a country where there is no law to restrain individuals from exercising their own discretion as to the time and circumstances of the marriage their children or the objects of their bounty may contract. It is perfectly impossible now, whatever it may have been formerly, to apply that doctrine not to lay conditions to restrain marriage under the age of twenty-one to the law of England. There can be no marriage under twenty-one without the consent of the parent."

not only upon the true considerations of morality, but upon a basis of sound sense and a purpose to advance the social welfare.¹

The modifications which have been made in, and the limitations which have been imposed upon, the general rule, are intended to eliminate its seeming harshness in particular classes of cases, and to render it more adaptable to property considerations, and better fitted to promote harmony in families. Thus, the desire of a parent to secure to his child the use and enjoyment of the property which is provided for the child's future maintenance and comfort has been fostered by permitting the parent to annex to a gift to that child a condition that upon marriage without consent, or to an objectionable person who would perhaps waste what the testator had bestowed, his bounty shall go to another.

A testator cannot legally prohibit the recipient of his bounty from marriage generally, and condemn him or her to a life of celibacy with its temptations to unchaste living. But he may forbid the legatee to marry a particular person, or one of a particular class or family, who, because of his character and habits, may be objectionable to the testator; or he may require a young and gullible legatee to secure, prior to a marriage, the consent to his or her marriage, of an experienced and reliable person in whom the testator has confidence, and who, by reason of his age and worldly experience, is better qualified to judge human nature and estimate the motives which prompt human actions than the legatee. The law does not presume either to regulate or to control the disposal of human affections. But the law, which interposes in so many ways to protect the guileless and inexperienced from the consequences of their present folly or their future improvidence, so far as prop-

¹ *Randall v. Marble*, 69 Me. (1879), 310, 313; *Waters v. Tazewell*, 9 Md. (1856), 291, 309; *Otis v. Prince*, 10 Gray (Mass.), 581, 582; *Parsons v. Winslow*, 6 Mass. 169; *Williams v. Cowden*, 13 Mo. (1850), 211, 214; *Hoopes v. Dundas*, 10 Pa. St. (1843), 75; *Maddox v. Maddox*, 11 Gratt. (Va., 1854), 804, 806; *Smythe v. Smythe*, 90 Va. 638 (1894), 19 S. R. 175; *Webster v. Morris*, 66 Wis. 366, 386; *Stillwell v. Knapper*, 69 Ind. 558, 1 Amer. Pro. R. 211; *Connelly v. Connelly*, 7 Moore, P. C. C. 438; *Hart's Trusts*, 8 De G. & J. 195; *Keily v. Monck*, P. C. 244, 247, 261; *Rishton v. Cobb*, 9 Sim. 615, 619, 5 M. & Cr. 145; *Long v. Dennis*, 4 Burr. 2052; *Bellairs v. Bellairs*, L. R. 18 Eq. 510, 514; *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255; *Morley v. Rennoldson* (1895), 1 Ch. 449, 64 L. J. Ch. 485; 72 L. T. 308, 43 W. R. 510, 12 R. 158; 2 Black. Com., p. 154.

erty interests are concerned, may, with equal if not with greater reason, interpose to prevent the miserable consequences which usually flow from un wisdom and recklessness in choosing a husband or a wife.

§ 495. **The validity of conditions in partial restraint of marriage — Marriage to a particular person forbidden.**— A condition forbidding or requiring a legatee to marry a particular person has always been valid, for in neither case will such a condition operate in *general restraint of marriage*.¹

An immediate devise to A. *on condition that he marry B.* will, if not controlled by the context, vest at once; and, as the condition is in that case subsequent, the question arises as to the time of its performance. Some cases hold that A. has his whole life for its performance.² And the same rule has been applied where the condition was that the legatee shall *marry into a certain family*.³ When, however, the condition that a legatee shall marry a certain person is precedent, the legatee cannot claim the legacy until he performs the condition; and it follows that if the person whom he is to marry is dead, and the condition is thus impossible of performance, the legacy is void.⁴ Conditions precedent and subsequent in partial restraint of marriage, in various other forms, have been sustained, particularly by the English cases. Thus, a condition that a legatee shall or shall not marry a man or woman who is *an adherent of a particular religious belief*,⁵ or a native of a particular country;⁶ that a marriage shall be performed with specified religious ceremonies;⁷ that a legatee shall not marry one who is beneath him or her in social standing, or who cannot, in case he is the husband, make a proper settlement;⁸ or a condition

¹ *Finlay v. King*, 3 Pet. (U. S.) 346, 524. And see also *Smith v. Cowdery*, 377; *Graydon v. Graydon*, 23 N. J. 2 Sim. & Stu. 358.

Eq. 230; *Davis v. Angel*, 4 De Gex, ⁵ *Duggan v. Kelly*, 10 Ir. Eq. R. 295; *F. & J.* 524; *Jervoise v. Duke*, 1 Vern. *Hodgson v. Halford*, L. R. 11 Ch. Div. 19; *Bertie v. Falkland*, 2 Vern. 333; 959. As, for example, a condition *Randall v. Payne*, 1 Bro. C. C. 155; that A. shall marry a Protestant, whose parents have always been *W. v. B.*, 11 Beav. 621.

² *Finlay v. King*, 3 Pet. (28 U. S.) such. In *re Knox*, 23 L. R. Ir. 542.

346, 376; *ante*, § 487. ⁶ *Perrin v. Lyon*, 9 East, 170.

³ *Randall v. Payne*, 1 Bro. C. C. 45, ⁷ *Haughton v. Haughton*, 1 Moll. 611.

55. *Contra*, *Love v. Manners*, 5 B. & ⁸ *Greene v. Kirkwood* (1895), 1 Ir. 130. *Contra*, *Kelly v. Monck*, 3 Ridg. P. C. 205.

⁴ *Davis v. Angel*, 4 De G., F. & Jo.

forbidding marriage with a person who has been or is a domestic servant, has been sustained.¹ A condition forbidding marriage into a family specified is valid, though no limitation over is inserted by the testator.²

§ 496. **The validity of conditions respecting marriage with consent—Necessity for a gift over.**—No doubt ever existed as to the validity at common law of a *devise of land conditioned upon marriage with consent*; but cases are numerous where the question of the validity of such a condition as *respects a legacy* has been considered and doubted. It has been held from the earliest times, in chancery, that a legacy upon the condition that the legatee shall obtain the consent of a person, who is named, to his or her marriage, is valid.³ But in all cases where a condition requiring consent to marriage is a condition subsequent, in order that it may be held valid it is required that there shall be a gift over.⁴

The effect of a bequest over, as validating a condition subsequent requiring consent to a marriage, has been based upon various reasons. By some authorities the doctrine *in terrorem* has been applied; that is to say, the absence of a devise over has been regarded as conclusive evidence that the testator intended *the declaration of forfeiture to be merely an idle threat, because he had not provided for non-fulfillment*. For where there is no one who is to take advantage of the failure to perform the condition, the fear which such a threat, held *in ter-*

¹ *Jenner v. Turner*, L. R. 16 Ch. D. 349, 353; *Scott v. Tyler*, 2 Bro. C. C. 188, 196, 50 L. J. Ch. 161, 43 L. T. 468. 431; *Fry v. Porter*, 1 Ch. Cas. 198;

² The court also determined that a condition that a legatee shall not marry into "the family of A." meant marriage to a daughter or son of A., in the absence of anything to show another meaning. Parol evidence was admissible to show that unfriendly relations existed between the testator and the person named, and that a short time prior to the execution of the will the testator had refused to consent to the marriage of his daughter, the beneficiary, to this person's son. *Phillips v. Ferguson*, 8 S. E. R. 241, 85 Va. 509. *Bertie v. Falkland*, 3 Ch. Cas. 129, 2 Vern. 333; *Hervey v. Aston*, 1 Atk. 361; *Reynish v. Martin*, 3 id. 330; *Sutton v. Jewke*, 2 Ch. R. 9; *Stackpole v. Beaumont*, 3 Ves. 89; *Knight v. Cameron*, 4 Russ. 325; *Creagh v. Wilson*, 2 Vern. 572, 573; *Chauncey v. Graydon*, 2 Atk. 616; *Dashwood v. Bulkely*, 10 Ves. 230; *Gardner v. Slater*, 25 Beav. 509; *Gray v. Gray*, 23 L. R. Jr. 399.

⁴ 2 Ch. R. 95; 2 Freem. 41, 47; 2 Eq. Cas. Ab. 213, 218; 1 Ch. Cas. 22; *Willes*, 83; 1 *Wilson*, 130; 3 Atk. 616; 3 Atk. 330, 364.

³ *Malcolm v. O'Callaghan*, 2 Madd.

rorem, will inspire is very little. On the other hand, the presence in the will of a devise over transformed that which was merely a forfeiture into an interest in the legatee who was to take it, and the estate which he was to take became a conditional limitation, which vested at once on the breach. The court would enforce it as a vested interest. Whatever may be the ground of the rule, it is settled that wherever the testator has provided that upon a failure to obtain consent to a marriage the legatee shall forfeit the interest which has been given him, but does not dispose of it to another on that event, the declaration is wholly inoperative as being merely *in terrorem*.¹

¹ "Different reasons have been assigned for allowing this operation to a bequest over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely *in terrorem*, which might otherwise be presumed. Others have said it was the interest of the legatee over which made the difference, and that the clause ceased to be merely a condition of forfeiture and became a conditional limitation to which the court was bound to give effect. Whatever might be the real ground of the doctrine, it was held that where a testator only declared that in case of marriage without consent the legatee should forfeit what was before given, but did not say what should become of the legacy, in such case the declaration was wholly inoperative." By Sir W. Grant, in *Lloyd v. Branton*, 3 Mer. 108. The doctrine of *in terrorem*, that is, the rule that a gift over is necessary in order that a condition shall be valid, applies only to conditions in restraint of marriage and to conditions against contesting the will. *Reuff v. Coleman's Heirs*, 80 W. Va. 171, 8 S. E. R. 597. And see also *In re Carr's Estate*, 188 Pa. St. 352, 22 Atl. R. 18. "If either real or

personal estate be devised on a *condition precedent* to the vesting of the estate, coupled *with a devise over* on breach of the condition, the devise or bequest is good, and the restraint effectual to defeat the estate. If the estate be real, the condition precedent in restraint of marriage will be good whether there be a *devise over or not*, and whether the restraint be general or qualified. If the estate be *personal*, the condition precedent in general restraint of marriage will be void, if there be no limitation over; but if there be a limitation over, it will be good. In regard to conditions subsequent, if they be in general restraint of marriage and there is a limitation over, they are void as to personal estate, but as to real estate the cases are in conflict. The later and better opinion seems to be that in that case the limitation over should not prevail. If the condition subsequent be in limited and qualified restraint of marriage, it will be good, provided it be accompanied by a limitation over. If there is no limitation over, it will be construed as *in terrorem* only, and not an imperative condition." By Brent, J., in *Gough v. Manning*, 26 Md. 347.

§ 497. **The discretion of the trustee or the executor to withhold consent — Jurisdiction of equity.**—No presumption always arises that a trustee who withholds consent is acting arbitrarily or fraudulently if a full and complete discretion upon this point has been given him. Even the fact that he is to benefit by marriage *without consent* raises no presumption alone that he is acting in bad faith, where he refuses consent. But it is obvious that the power to give or to refuse consent cannot be arbitrarily exercised where its sole purpose is to secure a proper marriage for the legatee, and to provide against his folly in contracting an improper one. A court of equity has jurisdiction to inquire into the motives which actuate a trustee who unreasonably withholds consent. If his motives are corrupt, or if he is prompted by a desire to benefit himself and not the legatee, the court may remove him, and may appoint a new trustee in his place, who will execute the power under the judicial direction after inquiry, and as it shall appear to be to the best advantage of the legatee.¹ Equity will also grant proper relief against a forfeiture resulting from the negligence of a trustee, who was to give consent, if the legatee is wholly without fault.² But if the legatee marries without consent, where *consent is a condition precedent* to the marriage, the legacy is forfeited. It cannot be restored by an express approval given *after the marriage* by the persons who were to have given their consent before marriage.³

§ 498. **The withdrawal of consent to a marriage.**—The consent of trustees to a marriage cannot be withdrawn after it has been given, unless it is shown to have been fraudulently procured. But if it was given upon a promise or agreement, either by the legatee or by some other person, which is not performed by the promisor, it may be withdrawn.⁴ This would

¹ Dashwood v. Lord Bulkely, 10 Ves. 230; Clarke v. Parker, 19 Ves. 18, 21; Williams, p. 1390; 1 Roper, 808. The same rule is followed where the trustee refuses to act at all. Goldsmid v. Goldsmid, Cooper, 225, 19 Ves. 368. See *post*, as to the proper execution of powers.

² O'Callaghan v. Cooper, 5 Ves. 117; Mallon v. Fitzgerald, 8 Mod. 28.

³ Burleton v. Humfrey, Amb. 256; Clarke v. Parker, 19 Ves. 1, 18, 21; Long v. Ricketts, 2 S. & Stu. 179; Reynish v. Martin, 3 Atk. 330.

⁴ Le Jeune v. Budd, 6 Sim. 441; Dillon v. Harris, 4 Bligh, 321; Lord Strange v. Smith, Amb. 263; D'Aguilar v. Drinkwater, 2 Ves. & Bea. 225;

1 Roper, Legacies, 810.

be the case where consent is given upon an agreement by the prospective husband of the legatee to make a suitable settlement upon her on the marriage, and he fails or neglects to do so within the time appointed.¹

§ 499. When the giving of consent may be presumed.—The giving of consent by trustees may sometimes be presumed from their actions or silence. *Qui tacet, consentire videtur*. The permission of, or the acquiescence in, a courtship, of which the trustees have actual knowledge, or permitting a marriage without active interposition or express dissent, may be equivalent to consent.² For, if no particular mode of granting consent be mentioned in the will, reason and equity demand that standing by and allowing a legatee to bestow his or her affections, and to engage the affections of another, and, *a fortiori*, to enter into a marriage engagement, shall be taken as a consent.³ So the giving of consent may be presumed from the lapse of time, where the person who was to take upon the failure or refusal to give consent remained silent for over twenty years, and until the death of all those whose consent was requisite.⁴

§ 500. The necessity for consent to be in writing.—A requirement that consent to the marriage shall be given in writing must be strictly complied with,⁵ though consent is fraudulently withheld. But where a person who was to give her consent in writing had permitted the legatee, her daughter, to receive the addresses of a man who subsequently became her husband, a consent in writing was wholly dispensed with under the circumstances.⁶ The informal character of the writing giving the consent is immaterial where no particular form is mentioned in the will.⁷

¹ *Dashwood v. Lord Bulkely*, 16 Ves. 230, 244.

² Where one trustee stated he had no objection to the proposed union, and, in answer to a written request for their consent, both trustees replied that they could not consent now, as the lady had rejected the suit of the legatee, which was not a fact, and the marriage subsequently took place with their knowledge, but without an express dissent or consent, the condition was complied with. *Keel-*

ing v. Smith, L. R. 44 Ch. D. 654, 59 L. Jr. Ch. 284, 63 L. T. 181; *Pollock v. Croft*, 1 Mer. 181.

³ *Campbell v. Nettlefield*, 2 Ves. 530; *Daley v. Desbouverie*, 2 Atk. 261, 273; *Le Jeune v. Budd*, 6 Sim. 611; *Bullock v. Bennett*, 7 D. M. & G. 283.

⁴ *In re Birch*, 17 Beav. 358.

⁵ *Clarke v. Parker*, 10 Ves. 12.

⁶ *Lord Strange v. Smith, Ambler*, 263; *ante*, § 499.

⁷ *Worthington v. Evans*, 1 Sim. &

§ 501. Whether the consent of a trustee may be dispensed with by reason of marriage with the consent of the testator.—A condition requiring the consent of trustees to the marriage of a daughter of the testator is satisfactorily complied with by her marriage during the life-time of her father with *his* consent,¹ or, if without his consent prior to the marriage,² with his approval subsequently given.³

A distinction is made in all cases where a marriage is had with the consent of the testator between conditions created by him requiring *consent to marriage only*, and those against *marriage during minority*, or *against marriage to a particular person*, or *against remarriage*. The consent of the testator himself, given when he had the right to refuse or withhold it, is regarded as a waiver of the condition that a legatee shall marry only with the consent of another. The purpose of the testator in requiring the consent of his trustees to a marriage which may be contracted *after his death* is to guard against an improvident marriage when *he*, being deceased, no longer has the power to do so. The testator, while alive, may do this himself by refusing his consent, and if he gives consent it will be presumed that he has done that which, after his death, was to be done by others *for him*. As regards other conditions respecting marriage, the giving or withholding of consent, generally not being *of the essence of the condition*, is immaterial. Where such an express condition is created, its performance

Stu. 165. Cf. *Mesgrett v. Mesgrett*, 2 Vern. 580.

¹ *Crommelin v. Crommelin*, 3 Ves. 227.

² A condition that a legatee shall marry "with the consent, written or otherwise, of the testator," is applicable only to marriage *during the testator's life-time*. If the legatee survive the testator, he or she takes absolutely, and may subsequently marry without the consent of the testator or of any other person. *Booth v. Meyer*, 38 L. T. (N. S.) 125, W. N. 1877, p. 224; *Curwen v. Corbett*, 1 Ir. R. 343 (1897).

³ *Wheeler v. Warner*, 1 Sim. & Stu. 304. "If the testator by his will,

contemplating a future event, gives certain directions respecting, as, for example, the marriage of A., and afterward the marriage of A. takes place in his life-time with his approval, it is easy to conceive, and has been rightly determined, that, the event occurring during the life-time of the testator which the will contemplates as future and to occur after his death, if he gives his approbation and consent to that occurrence, it shall be equivalent to what he has directed." Remarks of Campbell, L. C., in *Davis v. Angel*, 4 De Gex, F. & J. 524, 31 Beavan, 223. See also *Clarke v. Berkley*, 2 Vernon, 720, 729; *Parnell v. Lyon*, 1 Ves. & B. 479.

cannot be dispensed with when it has been broken by the person who was to abide by it, merely because he did this with the consent of the testator. To do this would be to strike the condition out of the will, and to render a gift in the will absolute which the language of the will shows the testator meant to be taken only on a condition precedent. This would permit a revocation of a portion of the will in a manner which is contrary to statute.¹

§ 502. **The consent of a majority of the trustees, when required — Death of a trustee.**— If the consent of all the trustees to a marriage is necessary, the consent of a *majority of them* is not a full compliance with the condition.² So where the consent of a class of persons, *e. g.*, trustees or executors, or the consent of one trustee or executor, is to be given, not individually and personally, but *virtute officio*, it cannot be dispensed with because all the trustees or executors or the particular person who was to give consent, are dead.³ The offices of those who are dead should be filled, and the consent of all then obtained.⁴ When the consent of parents is required to marriage and one of them is dead, the consent of the survivor, whether father or mother, must be procured, and will, *ex necessitate rei*, suffice as a full compliance with the condition.⁵

§ 503. **The postponement of marriage until majority as a condition — The effect of marriage under minority.**— A condition, either precedent or subsequent, that a legatee shall

¹ *Davis v. Angel*, 4 De Gex, F. & J. 524; *Bullock v. Bennett*, 7 D. Mac. & G. 283; *Yonge v. Furze*, 8 De Gex, Mac. & G. 756. Compare *Stephenson's Case*, 18 W. R. 1066, and *Smith v. Cowdery*, 2 Sim. & Stu. 358.

² *Clarke v. Parker*, 19 Ves. 1, 15, 16; *Ewens v. Addison*, 4 Jur. (N. S.) 1034.

³ But see *post*, § 784.

⁴ Thus, where the consent of guardians to a marriage was required, a legatee was not entitled to his legacy who failed to procure their consent, although all the guardians were dead. New guardians could and should have been applied for to the court, and, when appointed, their consent might have been obtained. *Brown's*

Trust, L. R. 18 Ch. D. 61, 50 L. J. 724, 44 L. J. 757.

⁵ *Dawson v. Oliver-Massey*, L. R. 2 Ch. D. 753; *Green v. Green*, 2 Jo. & Lat. 759. The consent to a marriage of a trustee or an executor who has renounced may, at the present day, be dispensed with. *Worthington v. Evans*, 1 Sim. & St. 165; *Boyce v. Corbally*, 2 Ll. & Go. 102. The same rule was applied in cases where the consent of trustees as a class had become impossible, because all had died or one or more had become insane. *Jones v. Suffolk*, 1 Bro. C. C. 528; *Graydon v. Hicks*, 2 Atk. 16; *Aislabie v. Rice*, 3 Madd. 256.

not marry until he or she shall attain majority or some other specified age is legal, if the limit of age is neither arbitrary nor unreasonable. But a condition which, under the guise of postponing marriage for a limited period, is intended to prohibit it altogether, is invalid.¹ A legacy which is to be paid to a legatee when he attains his majority may be conditioned to be forfeited if he shall marry prior to that age without consent. Such a condition is only expressing in words the power which the law confers upon a parent. If the gift vests at majority it will not be divested by the marriage of the legatee *without consent after he has attained his majority.*² The condition is thus precedent, and the legacy will vest in the legatee on the happening of either of the two events, *i. e.*, his attainment of majority or his marriage with consent during minority.³

§ 504. What constitutes a sufficient gift over.—In order that a condition forbidding a legatee to dispute a will or to marry without consent shall be valid, there must be an express gift over on non-performance of it. A direction that the legacy shall revert to the estate or fall into the residue,⁴ or into a special fund for the payment of debts and legacies, when it appears that the personal estate is sufficient for that purpose,⁵ or that the legacy shall go to the executor,⁶ or a power in the

¹Shackleford v. Hall, 19 Ill. 212; Desbody v. Boyville, 2 P. Wms. 547; Hogan v. Curtin, 88 N. Y. (1882), 162, 42 Am. R. 244; Webster v. Morris, 66 Wis. (1886), 366; Reuff v. Coleman's Heirs, 11 S. E. R. 598, 30 W.

Va. 171; Yonge v. Furse, 8 De G., Mac. & G. 756, 3 Jur. (N. S.) 603; Stackpole v. Beaumont, 3 Ves. 89; Sutton v. Jewke, L. R. 2 Ch. 9; Chauncey v. Graydon, 2 Atk. 616; Creagh v. Wilson, 2 Vernon, 573; Clifford v. Beaumont, 4 Russ. 325; Beaumont v. Squire, L. R. 17 Q. B. 905, 933.

²Hogan v. Curtin, 88 N. Y. 162; King v. Withers, Cas. Temp. Talb. 117, 1 Eq. Cas. Ab. 112, pl. 10; West v. West, 4 Gif. 198; Hemmings v. Munkley, 1 Bro. C. C. 303, 1 Cox, 39;

Austen v. Halsey, 13 Ves. 125.

³Cf. Toner v. Collins, 67 Iowa, 360, 875.

⁴Mallett v. Smith, 6 Rich. Eq. (S. C., 1852), 12, 15; Chew's Estate, 45 Pa. St. (1863), 228, 233; Fifield v. Van Wyck (Va., 1897), 27 S. E. R. 446; Hemphill v. Bayly, Pra. Ch. 562; Scott v. Tyler, Dick. 722, 723. But *contra* if the legacy is given to the residuary legatee in express terms.

⁵Keily v. Monck, 3 Ridg. P. C. 205.

⁶Cage v. Russell, 2 Vent. 352.

executor to revoke the legacy, and to distribute the same among other legatees at discretion,¹ is not a sufficient gift over.²

§ 505. Limitations until marriage distinguished from conditions in restraint of marriage.—The authorities distinguish between a provision for a legatee “until he or she shall marry,” or “while she is unmarried,” and an estate upon condition subsequent terminating by the marriage of the legatee. The distinction is largely technical, depending upon the exact language used; but the test is, “What was the purpose of the gift? What did the testator intend to accomplish?” If it is apparent from the will that he did not intend to prevent a marriage or to condemn the legatee to a life of celibacy, but that he intended solely to provide for her support while unmarried, and that, as soon as she was in a position to be supported by her husband, he desired the provision to cease and the property to be devoted to others, it is valid. The law will regard it as an estate upon limitation, not as an estate upon condition, and the gift over will go into effect as a conditional limitation.³

The purpose of immediate maintenance will not be interpreted maliciously to be a condition in restraint of marriage. Thus, a devise to A. “as long as she shall remain single and shall bear her present name” is valid as an estate upon limitation.⁴ And a condition that if a widowed daughter of the testator or of another person shall marry again her share will go over, is valid under the rule which recognizes the validity of conditions in general restraint of second marriages.⁵

§ 506. The validity of a condition against the remarriage of the widow of the testator.—The limitation by the testator

¹ *Mallett v. Smith*, 6 Rich. Eq. (S. C.) 12, 21.

² See also *Stevenson v. Abingdon*, 11 W. R. 935.

³ *Denfeld v. Smith*, 156 Mass. 265 (1892), 30 N. E. R. 1018; *Mann v. Jackson*, 84 Me. 400, 406 (1897), 24 Atl. R. 886; *Graydon v. Graydon*, 28 N. J. Eq. (1872), 230; *Courter v. Stagg*, 27 N. J. Eq. 305; *Connell v. Executors*, 35 Pa. St. 100; *Brotzman's Appeal*, 133 Pa. St. (1890), 478, 19 Atl. R. 564; *In re Bruch's Estate*, 39 Atl. R. 813 (1898), 185 Pa. St. 194, 196; *Herd v.*

Catron, 97 Tenn. 662, 665 (1896), 37 S. W. R. 551; *Scott v. Tyler*, Dick. (Eng.) 722; *Heath v. Lewis*, 3 De Gex, Mac. & G. 954; *Potter v. Richards*, 24 L. J. Ch. 488, and cases cited in note 1, page 664.

⁴ *In re Bruch's Estate*, 39 Atl. R. 813, 185 Pa. St. 194, 196.

⁵ *Herd v. Catron*, 37 S. W. R. 551, 97 Tenn. 662, 665; *Holtz's Estate*, 38 Pa. St. 422, 424. In one case, at least, it has been held that a gift over is not necessary. *Heath v. Lewis*, 3 D. M. & G. 954.

of an estate in lands to his widow during widowhood, or, in express terms, "while she remains a widow," "as long as she remains unmarried," "until her marriage," or in any similar language, is unquestionably valid. Such a limitation is not regarded as in restraint of marriage. The testator has an interest in providing that his widow shall not remarry. Nor is it at all inconsistent with public policy to restrain second marriages under all circumstances, however much it may be advisable to promote marriage in general. In very many cases the testator leaves young children who must be cared for by some one, and what person can be more competent to attend to their moral culture, rearing and education than their mother? So far as her influence and control over them are diminished by the control and government of a second husband which are incident to marriage relations, *their* interest will be injured by her remarriage.

Again, the man with whom she contracts the second marriage may seek, and he may perhaps secure, the control of the property which the testator has given his widow for her support and the support of the family of which she is the head. And besides all this, while she may need the provision made for her support if she remains unmarried, when she contracts a second marriage her husband is bound to support her, and the money which was originally given for her support may be more properly devoted to other objects of the testator's bounty. If she shall, by a second marriage, partially incapacitate herself for the performance of her duty towards *his* children, the testator has a right, in reason and morals, to require that the property which was given her for *that purpose only* shall go to the children or to other persons. Hence, whether we regard the estate during widowhood as an estate upon limitation, or as an estate upon condition subsequent restraining remarriage, it is unquestionably valid in either case.¹ Nor is it ma-

¹ Vaughan v. Lovejoy, 34 Ala. Smith, 28 Ga. (1859), 262; Snider v. (1859), 437; Security Co. v. Cone, 31 Newsom, 24 Ga. (1858), 139, 144; Be-
Atl. R. 71, 64 Conn. 579; Bennett v. shore v. Little, 114 Ind. 8, 16 E. R.
Packer (Conn., 1898), 39 Atl. R. 740; 499; Levengood v. Hoople, 124 Ind.
Philips v. Medbury, 7 Conn. (1829), 27, 28, 24 N. E. R. 373; Brown v. Har-
mon, 58 Ind. (1877), 207, 73 Ind. 412,
568; Chappell v. Avery, 6 Conn. (1825), 31; Fields v. Bush, 94 Ga. 664,
665 (1894), 21 S. E. R. 827; Doyal v. 37, 38; Hibbits v. Jack, 97 Ind. (1884),

terial that there is no gift over upon the remarriage of the widow.¹ And the same rule applies not only where the property given during widowhood is real estate, but also where it consists wholly of personal property.² So, also, a gift to a

570, 573; *Summit v. Yount*, 109 Ind. (1886), 506, 510, 9 N. E. R. 583; *Conger v. Lowe*, 124 Ind. 368, 371; *Coppage v. Alexander*, 2 B. Mon. (Ky.) 313, 314; *Vance v. Campbell*, 1 Dana (Ky.), 230; *Mann v. Jackson*, 84 Me. 400, 24 Atl. R. 886; *Nash v. Simpson*, 78 Me. 142, 148, 3 Atl. R. 53; *O'Neale v. Ward*, 3 Harr. & McH. (Md., 1791), 93; *Clark v. Tennyson*, 33 Md. (1870), 85; *Gough v. Manning*, 26 Md. (1866), 347; *Knight v. Mahoney*, 24 N. E. R. 971, 152 Mass. 523; *Fuller v. Wilbur*, (Mass., 1898), 49 N. E. R. 916; *Bates v. Webb*, 8 Mass. (1812), 458; *Mandlebaum v. McDonnell*, 29 Mich. (1874), 78, 84; *Pringle v. Dunkley*, 22 Miss. (14 S. & M., 1850), 16, 18; *Walsh v. Matthews*, 11 Mo. (1847), 131, 134; *Dumey v. Schoeffler*, 24 Mo. 170; *Little v. Giles*, 25 Neb. 313, 321, 41 N. W. R. 186; *Giles v. Little*, 104 U. S. (14 Otto, 1881), 291; *Traphagen v. Levy*, 45 N. J. Eq. 448, 453, 18 Atl. R. 222; *Chapin v. Marvin*, 12 Wend. (N. Y.) 538; *Zuenzer v. Minzemair*, 20 Misc. R. 212, 45 N. Y. Supp. 372; *Luigart v. Repley*, 19 Ohio St. (1869), 24; *Cornell v. Lovett*, 35 Pa. St. (1860), 100; *Rodgers v. Rodgers*, 7 Watts (Pa., 1838), 15; *Com. v. Stauffer*, 10 Pa. St. 350; *Bennett v. Robinson*, 10 Watts (Pa., 1840), 350; *Patton v. Church*, 168 Pa. St. 321, 322, 31 Atl. R. 1079; *Redding v. Rice*, 171 Pa. St. 301, 304 (1895), 33 Atl. R. 330, 37 W. N. C. 192; *Dixon v. Ramage*, 2 W. & S. (Pa., 1841), 142; *McCullough's Appeal*, 12 Pa. St. 197; *Fahs v. Fahs*, 6 Watts (Pa.), 213; *Squier v. Harvey*, 16 R. I. 226, 230, 14 Atl. R. 862; *Rowland v. Rowland*, 29 S. C. 54, 6 S. E. R. 903; *Martin v. Seigler*, 32 S. C. 267, 10 S. E. R. 1073; *Duncan v. Phillips*, 3 Head (Tenn., 1859), 415, 417; *Hawkins*

v. Skeggs, 10 Humph. (Tenn., 1848), 31, 33; *Hughes v. Boyd*, 2 Sneed (Tenn.), 512; *Little v. Bidwell*, 21 Tex. (1858), 597; *Selden v. Keen*, 27 Gratt. (Va., 1876), 576; *Maddox v. Maddox*, 11 Gratt. 804; *Story's Eq.*, § 283; *Scott v. Tyler*, 2 Bro. C. C. 380, 488; *Lloyd v. Branton*, 3 Mer. 108; *Dawson v. Oliver-Massey*, L. R. 2 Ch. D. 753; *Newton v. Marsden*, 2 Johns. & H. 356; *Richards v. Baker*, 2 Atk. 320; *Tricker v. Kingsbury*, 7 W. R. 652; *Craven v. Brady*, L. R. 4 Eq. 209, L. R. 4 Ch. App. 296; *Heath v. Lewis*, 3 De Gex, M. & G. 954; *Norley v. Renoldson*, 2 Hare, 580; *Barton v. Barton*, 2 Vernon, 308; *Evans v. Rosser*, 2 H. & M. 190; *Bird v. Hunston*, 2 Sw. 342; *Marples v. Bainbridge*, 1 Madd. 590; *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255; *Jordan v. Holkham*, Amb. 209.

¹ *Coppage v. Alexander*, 2 B. Mon. (Ky., 1842), 313, 314; *Holmes v. Field*, 12 Ill. (1851), 424; *White v. Sawyer*, 13 Met. (54 Mass.) 546; *Dole v. Thompson*, 3 Allen (85 Mass., 1862), 864; *Loring v. Loring*, 100 Mass. (1868), 340; *Gibbens v. Gibbens*, 140 Mass. (1885), 102; *Knight v. Mahoney*, 152 Mass. 523, 525; *Dixon v. Ramage*, 2 W. & S. (Pa., 1841), 142, 144; *Cornell v. Lovett*, 35 Pa. St. 100, 104; *Com. v. Stauffer*, 10 Pa. St. 350.

² *Dumey v. Sasse*, 24 Mo. 177; *Walker v. Quigg*, 6 Watts (Pa., 1837), 88. "A man may make a provision for his wife and declare that it shall cease on her second marriage, because it is considered that a husband has a sort of interest to preserve the viduity of his wife for the sake of his children." *Grace v. Webb*, 15 Sim. (1846), 388; *Lloyd v. Lloyd*, 10 Eng. L. & Eq. R. 143. In the early case of *Medbury v.*

widower while he shall remain unmarried is valid.¹ But a woman cannot, as the widow of the testator, take a gift to be enjoyed during her widowhood, where the marriage has been annulled, and hence is void *ab initio*. Never having been his wife, she cannot be regarded as his widow.²

§ 507. **The character of the estate taken by the widow of the testator.**—At the death of the testator the widow has a right to elect whether she will take what the law gives her by way of dower, or what the will gives her.³ If the testator gives his widow an estate during widowhood, or if he gives her, in express terms, an estate during her life, which is to cease on her remarriage, and she takes under his will, she has no cause to complain that on her remarriage she loses the estate which was given her conditionally. On her remarriage

Philips, 7 Conn. 568, the court said: "It is very reasonable that a man, leaving a widow with seven children, should be permitted to encourage her by suitable provisions in his will to remain single, and not subject his own offspring to the probable evils of a stepfather to waste her substance, and thereby render her less able to support and educate them." "The wife may reject the scheme her husband has provided for her support and government after his death, so far as her rights of property are concerned, if she prefer the dower allowed her by law. But after she has made her election to take under the will by omitting to renounce its provisions, she has no cause to complain that she is held to her choice, and not allowed, upon her subsequent marriage, to enjoy *absolutely* the larger estate that was given to her by her husband conditionally, under the expectation that if she kept the condition and remained unmarried she would devote herself and what she possessed to the well-being of the family of which she was the surviving head. This distinction, too, has a place in the habits and sentiments of our

people. Such dispositions of property are of very frequent occurrence and are approved by the common judgment of the community." By the court in *Dumey v. Schoeffler*, 24 Mo. 170, on page 175. An appointment by the testator of his widow as guardian of his daughter so long as she remains unmarried is valid. *Holmes v. Field*, 12 Ill. (1851), 424, 426.

¹ *Bostick v. Blades*, 59 Md. 231. In the case of *Allen v. Jackson*, L. R. 1 Ch. Div. 399, the court said by James, L. J.: "I am of the opinion that the gift over on the marriage of the widower is exactly on the same footing as a gift over on the marriage of the widow." But in *Watts v. Tazewell*, 9 Md. 291, such a condition was held void.

² In *re Hoddington*, L. R. 22 Ch. Div. 597, L. R. 25 Ch. Div. 685; *post*, §§ 601, 602. A condition forbidding the marriage of a widow, and *semble* of a person not before married, is not broken unless a valid marriage is proved to have taken place. Mere cohabitation and reputation are never enough unless an actual marriage was in fact intended. *Preece v. Searle*, 3 Jur. (N. S.) 711.

³ *Post*, § 744 et seq.

the estate absolutely ceases and goes to the devisee over or to the heirs or next of kin of the testator. If she shall die without having remarried and the terms of the will gave her an estate for life, on her death it goes to those to whom the testator has expressly given it. If a testator expressly gives an estate to his widow during her life-time or widowhood, with remainder to his heirs, stating that the purpose of it is to support the children during minority, her estate is not cut down, if she shall remain unmarried, by the attainment of majority on the part of the children.¹

No rule of law prevents the testator from giving her a fee-simple in lieu of dower which shall be defeasible and shall go to others on her remarriage. Thus, where the testator in general terms devises land in trust to pay the income to the widow for an indefinite period, without words of perpetuity or inheritance (and *a fortiori* when it is to her and her heirs), with a proviso that if she shall remarry the land is to go to others, she takes a fee-conditional at common law, which will be defeated by her remarriage. If she conveys the fee, her grantee takes it also subject to being defeated by her remarriage. But if she dies without having remarried, the fee descends to her heirs, and the devise over is defeated.² A devise of an estate not in fee to the widow of the testator so long as she shall remain unmarried, with a devise over in that event, but with no disposition of the estate in case she shall not remarry, gives her a life estate by implication if she shall die unmarried.³

§ 508. Conditions involving attainment of majority — Whether the legacy is vested or contingent.—It is often im-

¹ *Fields v. Bush*, 94 Ga. (1894), 664, 21 S. E. R. 827.

² *Traphagen v. Levy*, 45 N. J. Eq. 448, 453, 18 Atl. R. 222; *Squier v. Harvey*, 16 R. I. 226, 14 Atl. R. 862; *Patton v. Church*, 168 Pa. St. 321; *Redding v. Rice*, 171 Pa. St. 301, 304, 33 Atl. R. 330, 37 W. N. C. 192. The supreme court of the United States has held that where property was devised indefinitely, but with full power to dispose of the same so long as the devisee should remain the widow of the testator, with a remainder, if any remains when she should

remarry, that the widow took a fee-simple absolute and not conditional, which she could convey during her widowhood, and which would not be defeated by her subsequent marriage. *Giles v. Little*, 104 U. S. 291; overruled, *Little v. Giles*, 41 N. W. R. 186, 25 Neb. 313; followed, *Roberts v. Lewis*, 14 S. Ct. (1893), 945, 153 U. S. 367.

³ 1 Wash. R. P. 63; *Dole v. Johnson*, 3 Allen, 364; *Levengood v. Hoople*, 124 Ind. 27, 24 N. E. R. 373; *Myers v. Adler*, 6 Mackey, 515; *ante*, § 472, where the cases are fully cited.

portant, though sometimes difficult, to determine whether a condition attached to a fee, the contingency of which is the devisee attaining his majority, is subsequent or precedent. If it is *subsequent he takes a vested estate in fee at the death of the testator*, which may be defeated by his death under majority. If the condition is precedent, no estate vests in him until he attains his majority, and if he dies during his minority the devise over takes effect. The following rule has been laid down by the authorities (but which it is admitted must vary according to the circumstances of the case showing an intention by the testator that the estate shall or shall not vest): A bequest to a person "payable," or "to be paid at," or "when he shall attain" twenty-one years of age, creates a present vested interest,¹ for the words "payable" or "to be paid" do not refer to the time of the vesting of the bequest, but only to the time of its payment, and nothing shows that an immediate vesting is not intended. The gift vests as if no time was mentioned. So if the land be devised to A. when he shall be twenty-one, with a limitation to others in case he shall die during minority, he will take an immediate vested estate subject to being divested by death under that age. The condition of his attaining majority is subsequent, not precedent.² But if, on the other hand, a legacy be given "payable *if* he shall attain the age of twenty-one years," or, the word "payable" being omitted, "to A. at twenty-one," or "if" or "when" he attains twenty-one, time is essentially of the substance of the legacy, and its vesting depends on his living to attain his majority as a condition precedent.³

¹ 2 Wash. on R. P., p. 15; Boone v. Tipton, 15 Ind. 270; Rush v. Rush, 40 Ind. 83.

² Gregg v. Bethea, 6 Port. (Ala.) 9, 21; Watkins v. Quarles, 23 Ark. (1861), 179; In re Rogers, 94 Cal. 526, 530, 29 Pac. R. 962; Furness v. Fox, 1 Cush. (Mass.) 134, 136; Eldridge v. Eldridge, 9 Cush. (55 Mass., 1848), 516, 518, 519; Claffin v. Claffin, 149 Mass. (1889), 19, 22; Wardwell v. Hale, 161 Mass. 396, 399; Patterson v. Ellis, 11 Wend. (N. Y., 1833), 259; Goebel v. Wolf, 113 N. Y. 405; Nunney v. Carter, 5 Jones Eq. (58 N. C.) 370; Roberts v. Brincker, 4 Dana (34 Ky., 1836), 473;

Allan v. Van Meter, 1 Met. (58 Ky., 1858), 264; In re Jeremy, 178 Pa. St. 477, 35 Atl. R. 748; Scott v. Price, 2 S. & R. (Pa., 1815), 59; Bayard v. Atkins, 10 Pa. St. 17, 18; Reed's Appeal, 118 Pa. St. (1840), 215; McReynolds v. Graham, 43 S. W. R. 138 (Tenn., 1897).

³ Rogers' Estate, 94 Cal. 526, 29 Pac. R. 526; Bowman v. Long, 23 Ga. 242, 247; Phipps v. Ackers, 9 Cl. & Fin. 583; Cox v. Bird, 65 Ind. 277. The circumstance that there is a devise over in case of death under twenty-one tends to show that the estate is vested and that the condition is subsequent. Bowman v. Long, 23 Ga.

§ 509. Condition that a legatee shall return from abroad or shall claim legacy within a specified period.—A condition that a legatee whose whereabouts are unknown to the testator, or who resides in a foreign country, shall return and establish his claim to a legacy within a period specified, is valid. Whether the condition is precedent or subsequent depends upon the language of the will. A condition that the legatee should be discovered alive in one year;¹ that he shall establish his claim to the legacy in one year;² or that money which had been deposited by the testator in a savings bank should remain at interest, to be given to the legatee if he shall return, or if he be discovered alive within ten years,³ is a condition precedent, and on its non-performance the legacy is forfeited.⁴ Though the fact that the legatee, who is abroad, is ignorant of the testator's death, or of the giving of the legacy, does not excuse his non-performance of the condition,⁵ the executor or trustee ought to advertise the facts at the earliest possible opportunity in a newspaper which is likely to be read by the legatee. A condition that a legatee shall return does not require him to change his domicile; his temporary return from abroad, intending to return to the place of his foreign domicile as soon as his business is completed, is enough.⁶ A condition that an indefinite class of persons shall establish their claims to legacies within one year of the death of the testator is not fulfilled by their proving pedigrees in court, if the proof does not establish their claims.⁷ But a condition that a legatee shall claim in five years in writing to the executor was ful-

242, 247. And the same inference arises from the appointment of a trustee during minority. *Bromstrom v. Wilkerson*, 7 Ves. 421. But not from a power in the trustee to support the legatee in his discretion out of income during minority. *In re Wintle* (1896), 2 Ch. 711.

¹ *In re Duffy's Estate*, 36 W. N. C. 199, 4 Pa. D. C. R. 147.

² *Stedman v. Dunster*, L. R. 34 Ch. D. 742, 56 L. J. Ch. 564, 56 L. T. 565, 25 W. R. 624.

³ *Leader v. O'Loughlin*, 80 Ma. 47, 49 (1888), 12 Atl. R. 787.

⁴ *Sayres' Appeals*, 178 Pa. St. 416, 35 Atl. R. 989.

⁵ *Tulk v. Houlditch*, 1 Ves. & Bea. 248; *Powell v. Rawle*, L. R. 18 Eq. 243; *Burgess v. Robinson*, 3 Mer. 7; *Davis v. Angell*, 31 Beav. 223; *ante*, § 492.

⁶ *In re Arbib* (1891), 1 Ch. 601. So held where "A., now residing in Australia, when he shall return," was to be the executor.

⁷ *Stedman v. Dunster*, L. R. 34 Ch. D. 742, 56 L. J. Ch. 564, 56 L. T. 565, 25 W. R. 624.

filled by the procuring of letters of administration.¹ Conditions requiring the return of a legatee have sometimes been held subsequent. The estate being vested in the absentee, the performance of the condition which becomes impossible for any reason may be disregarded.² And as a legatee has the whole period within which to return, if he is prevented from doing so by an unavoidable cause, as sickness, lunacy or imprisonment, taking place *at the end* of the period, it is not material, where the condition is subsequent, that he did not return when it was in his power to do so.³

§ 510. Conditions requiring a legatee to release claims against the estate of the testator.—Conditions that legatees shall release valid and legal demands which they hold against the testator are favorably regarded by the courts. The validity of these conditions has been sustained in equity since 1704.⁴ The general rule is that a legacy by the testator to his creditor of an amount equal to or greater than the debt which is owed, without mentioning the debt, is to be received in place of that debt, unless it shall appear from the will itself, or from circumstances, that the testator intended he should receive them both.⁵ This is the equitable doctrine of satisfaction, and the creditor is compelled to elect between the legacy and the payment of his debt. But this presumption has never been favored, and many circumstances are seized upon to take a will out of its operation. If the testator expressly directs that a legacy shall not be paid to one to whom he is in any way liable, unless that person shall release his executor from liability, the presumption of an intention, which is the basis of the rule of satisfaction, does not apply, for the testator has expressly provided for an election by the legatee. The true basis of the validity of conditions requiring the release of claims, and conditions forbidding legatees to dispute the will, is the equitable

¹ *Tollner v. Marriott*, 4 Sim. 19. And where the testator provided that those creditors of his son who should release their debts in four months after his death should be paid, the filing of a bill in chancery to get the benefit of the condition was a compliance. *Franco v. Alvares*, 3 Atk. 342.

² *Bird v. Cross*, 8 Reports, 326; *Mo-Manamy v. Sheridan*, 51 N. W. R. 1011 (1892), 81 Wis. 538, 542; *ante*, § 498.

³ *Bird v. Cross*, 8 Reports, 326.

⁴ *Hawes v. Warner*, 2 Vern. 477, 478.

⁵ *Ante*, § 450.

principle of election, which requires that he who takes a benefit under an instrument shall abide by it.¹ The circumstance that the testator, while giving to a legatee some property of his own, requires him to release his estate, or stipulates that the legacy is to be taken in lieu of any claim the legatee may have against the testator, furnishes precisely the condition of circumstances which calls for the equitable doctrine of election.² A condition that the legatee shall bring in no bill against the estate of the testator for labor or services is not broken where the bill was for services rendered *before the execution of the will*; the court holding that the testator meant services to be rendered subsequently.³ The question may arise, Has a testator power to put a legatee to his election between enforcing a claim which the legatee has against him, and taking a legacy which is to be void if the legatee shall not release his claim, by a false statement that he is not indebted to the legatee? Where it appeared that the testator was in fact indebted to the legatee in a sum considerably in excess of the amount of the legacy, the condition was pronounced void as being tainted with fraud. The legatee was permitted to take the legacy and to enforce his claim; for while the testator *may impose reasonable conditions*, he cannot bind the legatee by a *false recital that he is not*

¹ See § 726 et seq.

² Popham v. Taylor, 1 Bro. C. C. 167; Mohun v. Duke of Hamilton, 1 Bro. C. C. 64; Earl of Northumberland v. Egremont, Amb. 657; Cleaver v. Spurling (1729), 2 P. W. 526, 528; Acherley v. Vernon, Willes, 153; Simpson v. Vickers, 14 Ves. 341; Shivers v. Goar, 40 Ga. 676, 679; Rogers v. Law, 66 U. S. 253, 261, sustaining conditions to release; In re Hollister, 47 Hun, 418; In re Strong's Estate, 25 N. Y. S. 790; In re Mercy's Estate, 49 Hun, 608, 1 N. Y. S. 687, 688; Smith v. Furnish, 70 Cal. 424, 12 Pac. R. 392; Denny v. Denny, 128 Ind. 240, 28 N. E. R. 519; Frost v. Sumner, 149 Mass. 98, 21 N. E. R. 231; Cong. Church B. Soc. v. Everett, 85 Md. 79, 36 Atl. R. 654; Darne's Ex'r v. Lloyd, 82 Va. 859, 5 S. E. R. 87. Where a testatrix gave land, in return for the kindness

of the devisee during her long continued illness, a condition is implied; and the devisee having sued for the board of the testatrix was held to have elected to refuse the land devised. Hapgood v. Houghton, 23 Pick. (39 Mass., 1839), 480, 483.

³ Farnham v. Barker, 148 Mass. 204, 19 N. E. R. 371. A condition attached to a legacy to A. and B. jointly, that they shall make no charge against the estate for services rendered the testator, is valid, while the presentation of a claim against the estate by *either of them without the concurrence of the other* is only a breach of the condition as respects the share of the legacy belonging to the person who presents the bill. Rockwell v. Swift (Conn.), 20 Atl. R. 200. See also Hawes v. Warner, 2 Vern. 477, 478.

*indebted to him.*¹ A condition not to make a claim or demand against the estate is not broken by the legatee continuing to prosecute, *as a defendant*, a litigation which was pending between him and the testator at the date of the latter's death.²

§ 511. Conditions against disputing the will or interfering with the management of the estate — Necessity for a gift over.— It is a long-settled rule in equity that a condition that a legatee shall not dispute a will is valid when it is attached to a gift of personalty, if there is a gift over. This rule was first laid down by the chancellor in the year 1688,³ and has since been strictly followed in England⁴ and America.⁵ In all cases a condition against disputing a will, attached to a

¹ In *re Vandervoort*, 17 N. Y. Sup. 316, 62 Hun, 612. Cf. *Schell's Estate*, 15 Pa. Co. Ct. R. 372.

² *Warbrick v. Varley*, 30 Beav. 347, 351.

³ *Powell v. Morgan*, 2 Vern. 90, 91.

⁴ *Cage v. Russell*, 2 Vent. 352; *Morris v. Burroughs*, 1 Atk. (1739), 399, 404; *Loyd v. Spillet*, 3 P. W. (1734), 344, 346; *Boughton v. Boughton*, 2 Ves. 16; *Wilkinson v. Dyson*, 10 W. R. 681; *Stevenson v. Abington*, 11 W. R. 935, 936; *Rhodes v. Muswell*, Hill Ld. Co., 29 Beav. 560, 568; *Evanturel v. Evanturel*, 31 L. T. (N. S.) 165, L. R. 6 C. P. 1; *Adams v. Adams*, L. R. 45 Ch. D. 426, 63 L. T. 442.

⁵ *Rogers v. Law*, 66 U. S. (1 Black), 253; *Black v. Herring*, 79 Md. (1894), 146, 28 Atl. R. 1063; *Hoit v. Hoit*, 42 N. J. Eq. (1886), 388, 7 Atl. R. 856; *Bryant v. Thompson*, 59 Hun (N. Y., 1891), 545, 549; *Chew's Estate*, 45 Pa. St. (1863), 228; *Mallet v. Smith*, 6 Rich. Eq. 12, 19; *Thompson v. Gant*, 14 Lea (Tenn.) 310; *Fifield v. Van Wyck* (Va.), 27 S. E. R. 446; *Smithsonian Institution v. Meech*, 18 S. Ct. (1898), 396, 169 U. S. 398, 413. In a recent case in the supreme court of the United States the principles of the earlier decisions were affirmed on this point, and the validity of conditions against disputing wills was upheld. *Smithsonian Institution v. Meech*, 18 S. Ct.

396, 169 U. S. 398, 413; reversing 8 App. D. C. 490. The court said on page 415: "The propositions thus laid down fully commend themselves to our approval. They are good law and good morals. Experience has shown that often, after the death of the testator, unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced, wherein not infrequently are brought to light matters of private life that ought not to be made public, and in respect to which the voice of the testator cannot be heard, either in explanation or denial, and as a result the manifest intention of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property, and have sought to incorporate provisions which would operate most powerfully to accomplish this result. And when the testator declares in his will that his several bequests are made upon condition that the legatees acquiesce in the provisions of the will, the courts wisely hold that no legatee shall, without compliance with that condition, receive his bounty or be put in the position to use it in the effort to thwart the provisions imposed."

legacy of personal property, is valid only where there is a gift over upon its breach; otherwise it will be held *in terrorem* only, and the legatee will not be bound by it.¹ But in the case of a condition attached to a devise of land, there has never been any necessity for a gift over.² This distinction, however, between legacies and devises, based as it is upon the rules of the Roman civil law, has not received universal recognition in America. No reason exists in the nature of the property itself, or in the nature of the condition, that it should be valid in the one case *without a gift over*, and invalid in the other. The tendency of the American cases is to disregard this distinction and to apply the same rule to devises of land as is applied to legacies. That is to say, in both cases, a valid gift over is necessary in order to make the condition valid.³

§ 512. **Language constituting a condition against disputing a will.**—The condition against litigation need not, in express terms, forbid a contest of the will. If the testator provides that no legatee shall “go to law to break the will,”⁴ shall “interfere in the administration of the estate,”⁵ or shall enter a *caveat* against the will, it is enough.⁶

§ 513. **What actions constitute a breach of a condition against contesting a will.**—Ordinarily the effect of a condition that legatees shall not *break or dispute* a will must be limited to attempts on their part to prevent its probate, or to revoke probate after it has been granted. But it may mean that the testator desires to compel legatees to acquiesce in his will as a *whole*, and then they can neither deny nor dispute any of its declarations, provisions or recitals. The testator may forbid legatees to controvert what he has stated to be a fact. Filing a bill *for the construction of a will*, in order to ascertain its validity and to enforce its provisions, is not a breach

¹ See cases in notes 4 and 5, p. 672. *Adams v. Adams*, L. R. 45 Ch. D. 426,

² *Hoit v. Hoit*, 42 N. J. Eq. (1886), 63 L. T. 442.

388, 390; *Cooke v. Turner*, 15 Mee. & Welsby, 727, 14 Sim. 493; *Bradford v. Bradford*, 19 Ohio St. (1869), 546, 547.

³ *Bradford v. Bradford*, 19 Ohio St. 546, 547.

⁴ *Bradford v. Bradford*, 19 Ohio St. 546, 547.

⁵ *Wilkinson v. Dyson*, 10 W. R. 681; 20 N. Y. S. 380.

⁶ *Hoit v. Hoit*, 42 N. J. Eq. 388, 390. But a condition “that should any legatee be dissatisfied with any gift” made in the will, then said gift shall be wholly withheld, is void as an inoperative condition because of its uncertainty. In *re Jackson's Will*,

of such a condition.¹ Nor does the attempt of the legatees to prevent the executor from exercising a power of sale, as by giving notice of its invalidity and prohibiting the sale, amount to a dispute of the provisions of the will.²

A condition subsequent, "to refrain from interfering or intermeddling with the management of the estate," is broken by an attempt to procure an injunction to restrain the trustees from acting, and to secure an account of the rents and profits.³ While the testator may legally insert a condition that legatees shall not dispute his will, or interfere with the management of the executors, he cannot prohibit a legatee from protecting, as *an individual, his own rights in the property he has devised to him*. Thus, a provision providing for arbitration in case of a dispute "*in any wise arising out of the estate*," with a condition that any devisee who should take any proceedings in law or in equity "relating to the matter and things aforesaid" should forfeit his legacy, is void. If this condition were enforced, it would prevent a beneficiary from defending and asserting his right to property devised, *against a stranger by ejectment*, or from collecting his rents. It is therefore void as absurd, inconvenient, and repugnant.⁴

§ 514. Conditions forbidding the litigation of the will are not in contravention of public policy.—The objection that conditions forbidding legatees to dispute wills are void, as "trenching on the liberty of the law," was made in an English case.⁵ But the court, while admitting that there were certain things which the testator could not legally attempt to restrain the legatees from doing, denied that entering into litigation was one of them. "The state," says Baron Rolfe in this case, "is interested that its subjects should marry; and therefore it will not, in general, allow parties by contract or condition in

¹ Black v. Herring, 79 Md. 146 (1894), 28 Atl. R. 1063.

² Chew's Estate, 45 Pa. St. (1863), 228.

³ Adams v. Adams, L. R. 45 Ch. D. 426, 6 L. T. 442.

⁴ Rhodes v. Muswell Hill Land Co., 29 Beav. 560, 563. The action of a legatee in refraining from contesting a will during his life-time may not prevent a forfeiture, if after his

death a contest is begun by his personal representative. This was held where the executor of a legatee, who died after the first testator, began a suit to set aside the will. Stevenson v. Abington, 12 W. R. 935, 936. See Jackson v. Westervelt, 61 How. Pr. (N. Y., 1881), 399.

⁵ Cooke v. Turner, 15 Mee. & Wel. 727, on p. 735.

a will to make the continuance of an estate depend on the owner not doing that which it is, or may be, the interest of the state that he should do." So, too, as the state is always interested in having its subjects engage in trade or agriculture, it will not allow a condition defeating an estate in case its owner should engage in trade or plow his arable land. On the other hand, the policy of the law is, so far as possible, to discourage unnecessary litigation. Heirs and next of kin are under no legal obligation to show the testamentary incapacity of their ancestor, or the invalidity of his will. As between the heir and the devisee the commonwealth stands neutral, having no interest whether the former or the latter shall own the land.¹

These considerations are not applicable where the legatee is an infant or a lunatic. Adults having mental capacity may elect for themselves between acquiescing in the will and disputing it. They may give away their rights or sue to enforce them. But an infant or a lunatic cannot do this. The courts must elect for him. Any condition which tends to oust the courts of their jurisdiction over incompetent persons, or to deprive them, especially those having equitable and probate jurisdiction, of the powers and duties they possess for the protection and interest of such persons, is contrary to public policy.²

§ 515. Conditions requiring a legatee to acquire or maintain residence.—The cases and authorities are in a contradictory state as to the validity of conditions requiring residence in a particular place or house. The most recent cases support the rule that a condition requiring that the devisee of a house or homestead shall live in it is a valid condition subsequent,³

¹ *Cooke v. Turner*, 15 M. & W. 727, 735.

² This rule was applied to a contest of probate by a special guardian of an infant legatee appointed by the court to represent the infant under the terms of a will providing that legacies should be void if the will was contested by a beneficiary "in person or by another." *Bryant v. Thompson*, 14 N. Y. Supp. 28, 50 Hun, 545, 551. A power conferred upon the executors in case of dispute to determine *finally* the intention of

the testator is valid as a power, and would be approved by the court if it is exercised fairly and without caprice. But a legatee who is aggrieved or prejudiced by the action of the executors has the right to have their action passed upon by a court of equity, and cannot be deprived of this right by the condition of forfeiture of his legacy. *Pray v. Belt*, 1 Peters (U. S.), 670, 679-681.

³ At the present time conditions requiring residence are invalid in England so far as they discourage a

which is broken by his voluntary removal and his establishing a residence elsewhere.¹

Where residence is regarded as a valid condition two questions arise. *First*, what acts on the part of the person who is to perform the condition shall be accepted as a valid performance? *Second*, where it is a condition subsequent, how long will he have for its performance? If it is not possible to ascertain what the testator meant when he required residence in a house or town, the condition will be void for uncertainty.² If the testator requires the devisee to *occupy the house*, personal occupation is certainly meant, and the condition is not performed if the devisee *leases the house*, and another occupies it under him as his lessee.³ A condition that a devisee shall reside in a house during a period specifically defined⁴ may be difficult of ascertainment; for the question is how long shall he remain in it? and whether his personal presence is required for some part of each day, week, or month; or whether it is sufficient that he shall establish his family there, he being at the time elsewhere?⁵ Even where the devise is in express terms that the property devised shall be *occupied by the devisee as his principal place of residence*, the difficulty of ascertaining how large a portion of his time he shall be required to spend there to perform the condition still remains.⁶

life tenant from exercising the power of sale conferred upon him by the Settled Lands Act. *Paget's Estate*, 30 Ch. D. 161, 56 L. J. Ch. 42, 58 L. T. 90, 33 W. R. 898; *Kemp v. Haynes*, 37 Ch. D. 306, 309, 57 L. J. Ch. 519, 58 L. T. 14, 36 W. R. 321.

¹ *Angel v. Springfield Home*, 157 Mass. 241 (1892), 81 N. E. R. 1064; *Harrison v. Harrison* (Ga., 1898), 31 S. E. R. 455; *In re Archer's Estate*, 23 N. Y. Supp. 1041; *Harrison v. Foote*, 30 S. W. R. 838 (1896), 9 Tex. Civ. App. 576; *Warston v. Warston*, 2 Jones L. (47 N. C.) 493. But see *contra*, *Par-due v. Givans*, 1 Jones Eq. (46 N. C., 1854), 306. In *Howell v. Patry*, 50 N. J. Eq. 265, 24 Atl. R. 1037, a condition attached to an estate for life in a farm that a devisee should live and remain on the same, but with no

devise over, was not broken where the devisee procured a partition of the farm.

² *Tillingham v. Bromley* (1833), Turn. & Russ. 530, 535; *Ridgway v. Woodhouse*, 7 Beav. 437, 444, 24 L. J. Ch. 488.

³ *More v. More*, 4 N. Y. Supp. 937.

⁴ *Walcot v. Botfield, Kay*, 534, 550.

⁵ *Astley v. Earl of Essex*, L. R. 18 Eq. 295.

⁶ *Wynne v. Fletcher*, 24 Beav. 430; *Dunne v. Dunne*, 3 Smale & Giffard, 22, 7 D. M. & G. 207. But at any rate forced absence from the house, particularly if caused by the misconduct of a co-devisee, is not a breach of condition. *Doe v. Hawke*, 2 East, 481; *Harrison v. Harrison* (Ga., 1898), 31 S. E. R. 455.

The fact that a person to whom a house is devised upon condition of his occupancy or residence is an infant may be material to determine whether it has been complied with. A minor has no legal power to change his domicile or to choose a place of residence.¹ His domicile is that of his parent or guardian, and changes with it. So where a house was devised to several in succession, on condition that each as he should become entitled should reside in it for a specified time, and, on the failure, refusal or neglect of the person to do so, his interest was to terminate and go to the next person, it was held that the condition did not apply to a minor who took in regular succession. He could not, in the law, either refuse or neglect to occupy the mansion house, and consequently the gift over did not take effect.² This rule does not apply where premises are given to *A. and her minor children* as joint tenants, on condition that *they occupy them*. The minority of some of the devisees will not prevent a removal and change of residence from working a forfeiture, for though the *minors* cannot change their residence, the *removal by their mother* is a breach of the condition.³

§ 516. The validity of a condition involving the assumption of a surname—What act shall constitute a sufficient performance.—A condition that a devisee shall assume a particular surname as soon as he shall come into possession,⁴ or when he shall attain the age of twenty-one,⁵ or that he shall assume the name generally,⁶ is valid.

¹ See *ante*, § 35.

² *Partridge v. Partridge* (1894), 1 Ch. 351. So also of a condition requiring residence in the case of an infant. *Parry v. Roberts*, 19 W. R. 1000, 25 L. T. (N. S.) 371. Why could not his guardian or a court of equity act for him in changing his residence, where a change would be so much to his advantage?

³ *Harrison v. Foote*, 30 S. W. R. 838, 9 Tex. Civ. App. 596. Conditions as to residence may be implied from language descriptive of the residence of the beneficiary. Thus, where the testator gives property to a class of persons residing in a particular place or country, proof that they reside in that place is a condition precedent to the vesting of the legacy. *Ross v.*

Hes, 20 W. R. 858; *Dale v. Atkinson*, 8 Jur. (N. S.) 41; *Woods v. Townley*, 11 Hare, 314. But a condition subsequent attached to a fee, that legatees shall continue to reside in the town of H., is invalid. *Newkerk v. Newkerk*, 2 Caines (N. Y., 1805), 345, 346. For an example of a condition requiring a devisee to acquire a residence in the United States and to assume a particular name, see *Halsey v. Goddard*, 86 Fed. R. 25.

⁴ *Webster v. Cooper*, 14 How. (55 U. S., 1852), 500.

⁵ *Taylor v. Mason*, 9 Wheat. (22 U. S.) 325, 348.

⁶ *Gulliver v. Ashby*, 4 Burr. 1929, 1940, 1 W. Bl. 607; *Abbiss v. Burney*, 43 L. T. 20.

The question always is, where this condition is inserted, What does the testator mean or require by directing that the legatee shall assume the surname? Is the mere act of the legatee in calling himself, or causing himself to be called, by the name mentioned, or his using it as his signature, a sufficient compliance with the condition, or does it require the actual change of that name to be made by an act of the legislature, or by an order of a court of law? The early English cases held that a condition requiring a change of name was satisfactorily performed by a voluntary and informal assumption of the name, without legislative authorization or legal proceedings.¹ And this rule was followed even where the testator expressly required that a legatee should, within a period specified, procure an act of parliament changing his name.²

Doubtless the common-law rule that a man may call himself by any surname, or as many surnames as he may see fit, without statutory or judicial authorization, is correct. His selection of a surname is not an act unlawful *per se*, though it may become so if by a change of name others are defrauded. But it is obvious that while such a rule may be well adapted for a simple condition of society, it is not to be encouraged when social conditions are as complex as they are in modern times. In England and in many of the states the assumption of a new surname is only valid upon compliance with formalities prescribed by statute, including in most cases the passage of an act of the legislature sanctioning the change. In the United States, upon application to the court having competent jurisdiction under the statute, and upon good reason shown for the change, an order will be granted permitting the assumption of a new surname. The names of all persons thus altered are subsequently certified to the legislature, and the changes which have been made are ratified by an annual statute passed at the close of the session. The recent English cases have repudiated the former rule that voluntary assumption of the name is a sufficient performance of the condition.

A legatee who is required to assume the name and arms of the testator must now, in England, obtain a license from the

¹ Lowndes v. Davis, 2 Scott, 71, 74, & Ry. 187, 5 Barn. & Ald. 543; Hawkins v. Luscombe, 2 Sw. 375; Barlow

² Doe d. Luscombe v. Yates, 1 Dowl. v. Bateman, 3 P. Wms. 65.

Heralds' College permitting him to assume the arms,¹ and an act of parliament granting him a license to change his name. Neither the poverty of the beneficiary nor the fact that a fund provided by the testator to defray the expense of obtaining this license has failed, will excuse the performance of the condition, or make it legally impossible of performance, where it is a condition precedent to the vesting of a legacy.² And a condition attached to a bequest to a corporation requiring it to change its name is only properly complied with when a change in the name of the corporation is effected in a proper and legal manner. If an act of legislature is necessary to effect the change it must be procured. The effect of the passage of a resolution by the trustees changing the name of a corporation, or instructing its officials to secure the necessary legislation to effect a change, is not a compliance with a condition precedent requiring the assumption of a new name.³

In the United States the proceedings by which a change of name is effected are usually so inexpensive and convenient that a condition requiring a change of name by a legatee would certainly not be regarded as fully complied with, unless the statutory requirements attendant on the assumption of the new name had been fulfilled. Where a condition requiring a change of name *is a condition subsequent, the legatee has all his life to comply with it.*⁴

§ 517. Conditions that legatees shall carry on a business. A condition that a legatee shall be paid an annuity out of the income of a firm in which the testator had a share at the date of his death, if the legatee shall devote his attention to that business, is a valid condition precedent. Where the testator provides that the legatee "shall devote as much of his personal attention to the business and to the estate as shall satisfy a committee named in the will that he is entitled to the legacy," the formal tender of his services by the legatee to the committee, and their rejection without valid or legal reason, are a suffi-

¹ Austin v. Collins, 54 L. T. 908.

² Bevan v. Mahon-Hogan, 27 L. R. Ir. 390.

³ Merrill v. Wisconsin Female College, 74 Wis. 415, 43 N. W. R. 104.

⁴ Gulliver v. Ashby, 1 W. Bl. 607,

4 Burr. 1929, 1940; Lowndes v. Davis, 2 Scott, 71, 74, 1 Bing. N. C. 597; Langdale v. Briggs, 8 D. Mac. & G. 391; ante, § 487.

cient performance of the condition required. The title to the annuity is by this performance vested in the annuitant.¹

If the carrying on of a business by legatees is a condition subsequent to the enjoyment of a legacy, on breach of which it is to fail, a substantial compliance will be required. Under this condition, where the legatees disposed of the business to a corporation of which they are elected directors, and in which they held all the shares, it was held that they had ceased to carry on the business, within the intention of the testator, as soon as it was transferred to the corporation.²

§ 518. **Conditions that a legatee shall pursue a prescribed course of study.**—A bequest of an annuity to A., "when he shall have attained the age of twenty-one and be fitted for college, to defray the expenses of a collegiate and theological education," constitutes the procurement of a preliminary education which shall fit the legatee for college a condition precedent to the payment of the legacy. This condition must be strictly complied with by the legatee.³ On the other hand, a legatee who has entered college subsequently to the death of the testator, intending to secure a theological education, is entitled to receive the annuity until his collegiate and theological training is complete, or until he abandons all intention to pursue theological studies. But a legatee whose college and professional education has been completed prior to the death of the testator, and who is engaged in missionary work, cannot claim the legacy, as the evident purpose of the testator is to stimulate future preparation for such work on the part of the beneficiaries.⁴

¹ Seeley v. Hincks, 81 Atl. R. 533 (1894), 65 Conn. 1.

² In re Sax, Barned v. Sax, 41 W. R. 584, 3 Reports, 638, 63 L. J. Ch. 683, 68 id. 849.

³ Shepard v. Shepard, 17 Atl. R. 178, 57 Conn. 24.

⁴ Shepard v. Shepard, 17 Atl. R. 178 (1889), 57 Conn. 24. A legacy which is to be given, after the termination of a prior life interest therein, to any one of the descendants of the testator who may at that time be preparing for the Methodist

ministry, to aid him in his studies, will not be paid to a descendant of the testator, who, though he subsequently obtained a license to preach as a minister of the Methodist church, was not engaged in theological studies at the date prescribed. Clayton v. Robards, 54 Mo. App. 539. A condition which is attached to a gift for preparing legatees for the ministry, directing that they shall pursue a course in their ministerial work, which is not optional with them, but exclusively within the control of

§ 519. **The illegality of conditions which tend to separate husband and wife.**—It is well settled that a condition, the performance of which would have a tendency to separate husband and wife, is void. Any direction or condition which will result in encouraging a wife to omit or neglect the performance of her duty to her husband, or which will result in depriving her of the support and protection of her husband, is absolutely illegal.¹ It is not material in what language the condition is expressed if it is apparent from the will, taken in connection with the circumstances of the person who is to perform the condition, that the intention of the testator was to bring about a *future separation* between husband and wife. Thus, a condition that a legatee should cease to reside at S., where her husband was compelled to reside because of his business or profession, is illegal, as it would involve a separation from him if she were to change her place of residence.²

The rule was very early established in the ecclesiastical courts. Thus, it was held that a bequest to A., to be paid in monthly instalments if she shall live with her husband, but *to be increased if she shall live apart from him* and with her mother, being subsequent and illegal, gave A. the fee absolutely.³ A condition precedent of the same sort has been held void. Thus, where a legacy was to be paid if at any time subsequently the legatee “*should conclude not to live with her husband*,”⁴ or where it was required that a legatee should “*prove to the satisfaction of the executors that he has freed himself from all influence, connections, association, cohabitation and relations of every name, character and description of and with a certain woman*” who was the wife of the legatee at the time of the execution of the will,⁵ the condition is invalid as against good morals.⁶

their ecclesiastical superiors, is a condition subsequent, and, for the reasons stated, being impossible of performance, will be disregarded, and the legacy will become absolute. *Field v. Drew Theological Sem.*, 41 Fed. R. 371.

¹ *Cartwright v. Cartwright*, 3 D. M. & G. 983; *Bean v. Griffiths*, 1 Jur. (N. S.) 1045; *Shewell v. Dwaris*,

Johns. (Eng.) 172; *O'Brien v. Barkley*, 78 Hun, 609, 28 N. Y. S. 1049.

² *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604.

³ *Brown v. Peck*, 1 Eden, 140.

⁴ *Conrad v. Long*, 33 Mich. (1875), 78.

⁵ *Hawke v. Euyart*, 30 Neb. 149 (1890), 46 N. Y. R. 422.

⁶ A condition that a married woman shall “live apart from her hus-

§ 520. **Provision for the support of a wife while living apart from her husband.**—It does not follow, under the rule stated, that the testator has no power to provide for the support of the wife who is living apart from her husband. The test is, in all cases, was it the intention of the testator to *bring about a future separation or a divorce between the parties?* or was it to *provide for a wife who had been deprived of her husband's support?* To permit a testator to provide for a woman who has been deserted by her husband while the desertion continues is not only legal and commendable, but conducive to good morals and the best interests of society. If it shall appear that a legacy which is conditioned to be paid a legatee while she shall live separate from her husband was not intended to instigate, encourage or promote the separation of the husband and wife, it is valid. Thus, if the parties were *living separate at the date of the will*, and the intention is merely to support a wife while she is deprived of the support which, by law, her husband is obligated to give her, the legacy is valid.¹ Hence, where the devisee was to have land in fee if he should be divorced from his wife, the condition precedent, requiring a divorce, was held valid where he had, at the execution of the will, an action for divorce pending against his wife.² And generally, if the condition relates solely to an existing state of affairs, and is only intended to support a legatee when she has

band and shall continue to do so," with a further condition that all payments shall cease if at any time she shall cohabit with him, is absolutely void. *Wren v. Bradley*, 2 De Gex & Smale, 40, 49. In this case the court on page 49 said: "It is impossible to read the will without perceiving that the testator's wish and object were to obstruct a reconciliation, and prevent the wife from living with her husband; and that, by that wish, by that object, its provisions for her were influenced and directed. The weight of the authorities and the principles of the civil law, so far as I consider them applicable, seem to me to render a decision in this case in the daughter's favor consistent

at once with technical equity and moral justice."

¹ *Cooper v. Clason*, 3 Johns. Ch. (N. Y.) 521; *Cooper v. Remsen*, 5 Johns. Ch. (N. Y.) 459; *Porn v. Hortsmann*, 80 Cal. 452, 457, 459. In this case the condition was, "in the event of any of my daughters becoming a widow, or otherwise becoming *lawfully separated* from their husbands." The court held that as the testator spoke only of a lawful separation, or a divorce because of the husband's misconduct, the condition was valid, as the doing of a legal act in a legal manner could not constitute a sufficient reason for divesting a legacy.

² *Ransdell v. Boston*, 172 Ill. (1896), 439, 445, 446, 50 N. E. R. 45.

been deprived of her husband's support because of his death, or because the marriage has been annulled in proper legal proceedings, it will be valid.¹

§ 521. **Conditions precedent requiring the possession of good habits by a legatee.**—It is very well settled that conditions precedent which require a legatee to possess those traits of personal character which are calculated to make him a useful member of society are valid. The right of the testator in bestowing his bounty upon others to require that those who are to be the recipients of it shall render themselves worthy by acquiring and cultivating good morals, by the practice of habits of industry and sobriety, and by refraining from actions by which the property bestowed upon them shall be dissipated, is indisputable.²

The condition which has for its object the promotion of good conduct upon the part of a legatee must be stated in definite language. It ought to point out with reasonable certainty what actions or what habits will constitute a performance or a breach. The condition must be definite in its requirements, and must also point out who is to define the measure of performance necessary for its fulfillment. A requirement that legatees shall not receive their legacies if they are idle or prof-

¹ *Thayer v. Spear*, 59 Vt. (1887), 327. Where the intention is clearly apparent merely to provide for the support of a married woman, a devise to a woman, "if she shall become a widow," will vest the property in her where she obtains a divorce from her husband because of his misconduct. *Rittenhouse v. Hicks*, 23 Weekly L. B. 269.

² *Cassem v. Kennedy*, 35 N. E. R. 738, 147 Ill. (1893), 660; *Weakley v. Buckner*, 91 Ky. (1891), 457, 16 S. W. R. 130; *Jackson v. Thompson*, 84 Me. 44, 24 Atl. R. 459; *West v. Moore*, 37 Miss. (1859), 114; *Hawke v. Euyart*, 80 Neb. (1890), 149, 46 N. W. R. 422; *Den v. Messenger*, 33 N. J. L. (1869), 498; *Pedrick v. Pedrick*, 26 Atl. R. 267, 50 N. J. Eq. 479; *Forsyth v. Forsyth*, 46 N. J. Eq. (1890), 400, 19 Atl. R. 119; *Lombard v. Witbeck*, 173 Ill.

396, 51 N. E. R. 396; *Onderdonk v. Onderdonk*, 5 N. Y. Supp. 242 (1889), 52 Hun, 614; *Rushmore v. Rushmore*, 59 Hun (1891), 615, 12 N. Y. Supp. 776; *Burnham v. Burnham*, 79 Wis. (1891), 557, 48 N. W. R. 661; *Delaney v. Delaney*, L. R. Ir. 15 Ch. Div. 55. See also *Marston v. Marston*, 47 Me. 495. A trust for A. to pay him the income, and *when he shall reform* then to convey the property to him absolutely, does not contravene the rule of perpetuities, though no disposition of the property is made in case A. shall die *before* the property is transferred to him. The alienation of the fee is suspended only during the life of A., and upon his death the trust is at an end and the property goes to his heirs absolutely. *Meek v. Briggs*, 87 Iowa (1893), 620, 54 N. W. R. 456.

ligate is too vague and general to be enforced, and for that reason is void, unless the testator has conferred a power upon some person to determine arbitrarily and in his irresponsible discretion whether in his opinion the condition has been fulfilled.¹ Whether a person is idle or dissipated is largely a matter of opinion.²

The opinions of men regarding actions which may or may not constitute dissoluteness or profligacy differ according to the moral standpoint from which they view them. The immorality of some things is admitted by all. Thus, in the case of a legacy to a girl who for some time had been, and was at the execution of the will, living in the family of the testator upon a condition that she should remain in his family until her majority and should conduct herself as she had done, there could be no doubt the condition was broken where the legatee gave birth to an illegitimate child before she was twenty-one years of age, and, at the request of the widow of the testator, ceased to be a member of the family.³

A condition precedent that a legatee shall prove to the satisfaction of executors that he has abstained from the use of intoxicants and tobacco during a certain period;⁴ that he shall not frequent or visit disreputable places; or that he shall not associate with gamblers, drunkards or other immoral persons, is sufficiently clear and will be sustained. And a condition precedent requiring a legatee to satisfy the executor, at the time his legacy becomes payable, that he is in possession of such business habits and traits of personal character as will enable him to make good and prudent use of a legacy, is valid and reasonable as a condition precedent.⁵

¹ *Cassem v. Kennedy*, 147 Ill. 660, 85 N. E. R. 738.

² A direction to trustees that as a legatee was of irregular habits nothing but income should be paid to him "until he marries and settles down in life, or until he reaches the age of forty," and on the happening of either event the title to the legacy to become absolute, the legatee being also required to appear and to show to the satisfaction of a court that "he is a reformed man, or that he is over forty years of age," is a good

condition precedent and is not invalid for uncertainty. Nothing except the income vests in the legatee until the condition shall have been fully performed. *Cassem v. Kennedy*, 147 Ill. 660 (1893), 85 N. E. R. 738.

³ *Reuff v. Coleman's Heirs*, 30 W. Va. 171 (1887), 8 S. E. R. 597.

⁴ *In re Stevens' Estate*, 30 Atl. R. 243 (1894), 164 Pa. St. 209, 35 W. N. C. 246; *Onderdonk v. Onderdonk*, 5 N. Y. Supp. 242; *Hawks v. Euyart*, 30 Neb. (1890), 149, 46 N. W. R. 422.

⁵ *Rushmore v. Rushmore*, 59 Hun,

A condition that the executor shall pay to a legatee only so much as may be sufficient to support him in a decent and frugal manner, if the legatee shall not make a proper use of his money, is a condition precedent to the payment of the legacy.¹

§ 522. **Conditions against alienating or charging lands devised in fee.**—The power to sell, mortgage, or otherwise incumber land is an inseparable incident of the ownership of land in fee-simple. The term “fee-simple” itself indicates that the fee is given free of any qualification or condition; and, as

615, 12 N. Y. Supp. (1891), 776. Cf. *Whitney v. Whitney*, 63 Hun, 59 (1892), 18 N. Y. Supp. 3. So also a direction that a devisee shall conduct himself in all respects to satisfy the executors, or the survivor of them, of which fact a declaration in writing, signed by said executor, shall be conclusive, is valid. *Delaney v. Delaney*, L. R. Ir. 15 Ch. Div. 55. “His right to it at that time, and thereafter, is made dependent upon his being of good moral character, and having in the meantime learned some useful trade, business or profession, in the judgment of the executors. Without committing ourselves to the doctrine of all the cases cited, especially such as may be regarded as touching matters of conscience, we must hold that the clause in question is capable of performance by any person of ordinary intelligence, and is not contrary to public policy. It is designed to put the beneficiary under wholesome restraint. It is not in contravention of good morals, nor any law, nor any matter of conscience. . . . It is left to the determination of executors; but that does not give them the right to exercise an arbitrary power of exclusion, but only a reasonable exercise of judgment.” *Casoday, J., in Webster v. Morris*, 66 Wis. 366, 389. In *Edgerly v. Barker* (N. H.), 32 Atl. R. 766, where a legatee was required, as a condition prece-

dent, to lead a correct life, the court refused to interfere in controlling the discretionary power of the executor to determine whether the condition had been fulfilled. A condition that a devisee shall not receive any part of or interest in the property devised, unless within five years after the death of the testator he shall reform, and become a sober and respectable citizen, and that he shall continue to lead a sober and decent life for ten years, with a devise over in case he did not reform, is a condition subsequent. The estate vests in the devisee at the death of the testator, and, having thus vested, does not divest when the performance of the condition becomes impossible because of the death of the devisee, unreformed, prior to the expiration of the first period of five years. *Burnham v. Burnham*, 79 Wis. (1891), 557, 567. A condition that a devisee shall learn some useful trade, business or profession, and that he shall be of good moral character, with a provision that the executor shall determine whether the condition has been properly complied with, is valid and in contravention of no principle of law. *Webster v. Morris*, 66 Wis. (1896), 366, 386.

¹ *Pedrick v. Pedrick*, 50 N. J. Eq. 479 (1892), 26 Atl. R. 267; and cf. *Lippincott v. Stattsburg*, 47 N. J. Eq. 21 (1890), 20 Atl. R. 360.

it is descendible, it is of course alienable.¹ The power of alienation is of necessity unlimited, for all the interest which it is possible to convey in the land is given when the fee is conveyed. So, too, from the standpoint of public policy, the power of disposing of lands held in fee-simple, either by mortgage or sale, is not only one of the most valuable and important privileges attached to the ownership of land, but it is absolutely necessary to meet the social and commercial needs of the community. It is by the exercise of this privilege or power of absolute alienation that the owner is enabled to meet sudden emergencies which require a pecuniary outlay, and to provide for the present support and education, and for the future career, of those who are dependent upon him. And though attempts to create conditions which shall restrain the power of an owner in fee-simple to dispose of his estate or to encumber it have been extremely numerous, it is well settled that such a condition attached to a devise of the legal title to lands in fee is absolutely void as repugnant to the estate granted.² A provision that a devisee in fee shall not have power to sell, but may leave the same to her children,³ or a provision that a devisee in fee shall not give or bequeath any of the estate to her relations or to those of the testator,⁴ is invalid, as against the rules of the law and against public policy. But a provis-

¹ 2 Black. Com., p. 106.

² *Potter v. Couch*, 11 S. Ct. 1005, 141 U. S. 296; *Langdon v. Ingram*, 28 Ind. (1867), 360; *Allen v. Craft*, 109 Ind. 476 (1886), 9 N. E. R. 919; *Fullenwider v. Watson*, 113 Ind. (1887), 18, 19; *Conger v. Lowe*, 124 Ind. 368, 370; *Ernst v. Shinkle*, 95 Ky. 608, 26 S. W. R. 813; *Turner v. Hallowell I. Co.*, 76 Me. 527, 530; *Cushing v. Spalding*, 164 Mass. (1895), 287, 41 N. E. R. 297; *Hall v. Tufts*, 18 Pick. (35 Mass., 1836), 455; *Hawley v. Northampton*, 8 Mass. (1811), 37; *State v. Holmes* (Mich., 1898), 73 N. W. R. 548; *Mandlebaum v. McDonnell*, 29 Mich. (1874), 78, 91 et seq.; *Lovett v. Gilder*, 35 N. Y. (1867), 467; *De Peyster v. Michael*, 6 N. Y. 467; *Pardue v. Givens*, 1 Jones Eq. (N. C.) 306; *Dicks v. Pitchford*, 1 Dev. & Bat.

(N. C.) 480; *McIntire v. McIntire*, 123 Pa. St. 323, 23 W. N. C. 41, 16 Atl. R. 783; *Reifsnyder v. Hunter*, 19 id. 41; *McCullough v. Gilmore*, 11 Pa. St. 370, 374; *M'Williams v. Neely*, 2 S. & R. (Pa.) 513; *Van Osdell v. Champion*, 89 Wis. (1895), 661, 665, 62 N. W. R. 539; *Zellmer v. Landgoth*, 94 Wis. (1896), 607, 609; *Stansbury v. Hubner*, 78 Wis. 223, 231. See also *Co. Lit.* 206b, 223a; *Ware v. Cann*, 10 Barn. & Cresw. 433; *Willis v. Hiscox*, 4 My. & C. 201; *Holmes v. Godson*, 8 Dr. M. & G. 152; *Barton v. Barton*, 3 K. & J. 512; *Shaw v. Ford*, L. R. 7 Ch. Div. 669.

³ *McIntire v. McIntire*, 16 Atl. R. 783, 123 Pa. St. 323 (1888), 23 W. N. C. 41.

⁴ *Morse v. Blood* (Minn.), 71 N. W. R. 632.

ion that the homestead left to certain persons during their lives shall be used as a home or asylum for the wife and children of the testator, and shall not go into the possession of any other person while any of them live, not being a restraint on the alienation of the fee, is valid.¹

§ 523. **Conditions creating a partial restraint upon the power of alienation** — **Alienation except to particular persons may be prohibited.** — The authorities are not harmonious on the question whether a condition attached to a devise of the fee that the devisee shall not alienate, *except to particular persons or to a class of persons*, is valid. The English cases have sustained the validity of a condition that a devisee of the fee shall not sell the estate to anybody *except to her sister or sisters*, or to some one or more of their children,² or that he shall not sell to A. or his heirs, or that he shall not sell to corporations.³ But while a condition that a devisee of an absolute interest shall not dispose of the fee except to an unascertained class of persons, which may ultimately prove to be very numerous, is valid, a condition not to sell to any but a particular person would be invalid; for the testator, by naming himself or another person, *who is or must of necessity be dead*, or naming a person whose whereabouts are unascertainable, or who is a pauper, might prevent a sale indefinitely.⁴ Thus, a condition that a devisee shall not sell the fee of lands devised to him, except to A.,⁵ is invalid. But a condition that a devisee shall not sell land *out of the family* is valid; for it allows a sale among a numerous class.⁶ In America the decisions do not encourage

¹ Reynolds v. Crispin (Pa., 1887), 11 Atl. R. 236. A condition that devisees shall hold and till land devised to them in fee tail is repugnant, and hence void. Stansbury v. Hubner, 73 Md. 228, 20 Atl. R. 904. See also Hewitt v. Durrant, 78 Mich. (1889), 186, 44 N. W. R. 318. See also *ante*, § 491.

² Doe v. Pearson, 6 East, 173.

³ Coke, Litt. 223a.

⁴ Attwater v. Attwater, 18 Beav. 330; Muschamp v. Bluet, J. Bridgm. 123, 137.

⁵ Hartman v. Herbine, 7 Pa. Co. Ct. R. 630; Rea v. Bell, 147 Pa. St. 118,

23 Atl. R. 349; Den v. Blackwell, 4 N. J. Eq. 386.

⁶ In re Macleay, L. R. 20 Eq. 139. Compare Ware v. Cann, 10 Barn. & Cresw. 433. The distinction is between a restriction of alienation to a family or other fluctuating class, the members of which are unknown and some of whom will probably purchase, and a restriction of alienation to *persons named*; for, if the latter condition is sustained, the testator may, by selecting a person deceased or who is a pauper, prevent alienation absolutely.

the creation of conditions restricting the exercise of the power of alienation to a particular class. It has been held that a condition that devisees shall sell only to one another,¹ a vague proviso that a devisee shall so manage her estate that certain of her heirs shall not inherit,² that a devisee shall sell only to his family³ or to the heirs of his father's family,⁴ meaning thereby heirs of his father, is absolutely void.⁵ But where the testator devised the privilege to occupy rooms in a house occupied by his children, on condition that the devisee should not convey it to any person but the heirs of the testator, the condition was held valid.⁶

§ 524. **Conditions against alienating land during a limited period.**—Some conflict of authority exists among the cases on the question of the validity of a condition subsequent attached to an estate in fee which prohibits its alienation for a limited period. The English rule is that a condition that a devisee in fee of real estate shall not alienate during a certain definitely specified period, which is not too remote, is valid.⁷ The English authorities also hold that this rule is applicable to gifts of personal property.⁸

Many cases, however, particularly in the courts of the United States, repudiate this rule altogether. But this conflict of authorities upon the validity of a restraint upon alienation for a limited period is more apparent than real. Upon an examina-

¹ *Schermerhorn v. Negus*, 1 Denio (N. Y., 1845), 448, 450.

² *Williams v. Jones*, 2 Swan (Tenn.), 620.

³ *Farris v. Rogers*, 7 S. W. R. 543.

⁴ *M'Cullough's Heirs v. Gilmore*, 11 Pa. St. 370, 373. "If, however, a restraint upon alienation be confined to an individual named, to whom the grant is not to be made, it is said upon very high authority to be a valid condition. But this case falls within the general principle, and it may be very reasonably questioned whether such a condition would be good at the present day." 4 Kent, Com. 136. Citing Co. Litt. 283. So held in *Brothers v. McCurdy*, 86 Pa. St. 407.

⁵ And generally a condition restricting alienation to a limited class of persons is void, unless there is a reversion or limitation over to a third person for a breach of the condition. *Fowlkes v. Wagoner* (Tenn., 1898), 46 S. W. R. 566.

⁶ *McKinster v. Smith*, 22 Conn. (1853), 628, 630. And see *Mandlebaum v. McDonnell*, 29 Mich. 78, 96.

⁷ *Large's Case*, 3 Leon. 82, 3 Leon. 182; *Barnett v. Blake*, 2 Dr. & Smale, 117.

⁸ *Kiallmark v. Kiallmark*, 26 L. J. Ch. 1; *Pearson v. Dollman*, L. R. 3 Eq. 320; *Graham v. Lee*, 23 Beav. 386; *Samuel v. Samuel*, L. R. 12 Ch. Div. 152; *Churchill v. Marks*, 1 Collyer, 441; *In re Payne*, 25 Beav. 556.

tion of the cases cited it will be found, in all instances where a restraint upon the alienation of real estate was involved, that the interest given was a future interest, and the vesting of the legal title was contingent during the period when it could not be alienated. And, so far as such conditions appertaining to personal property are concerned, they are only good so far as they relate to the period during which payment and distribution are suspended. If they extend beyond the date of payment they are invalid. And it may safely be said that no case or authority is to be found except *obiter dicta* that sustains the validity of a condition restraining the power of alienating the legal title to the fee of land, even for a limited period, which is attached to a vested estate, either in possession or in remainder, in a case where the devisee is competent to convey.¹ A devise of land to A. in fee, directing that he shall not sell until he is twenty-five, being repugnant to the nature of the estate, is void.²

Devises of lands in trust for infants, with a power of sale, which is not to be exercised until the beneficiaries attain majority, are common. Such a restriction of the power of alienation is not illegal *per se*; nor is a direction attached to an absolute gift to a person under the age of twenty-one, that he shall not sell it until he attains majority, whether the gift is contingent on his reaching that age or not, to be regarded as an exception to the general rule against conditions forbidding alienation of the fee. This *condition creates no greater restraint upon the alienation of the fee than the law does*. The infant cannot in any event convey a fee during his minority.³

¹ Jones v. Port Huron Co., 171 Ill. 502, 49 N. E. R. 700; Mandlebaum v. McDonnell, 29 Mich. 74, 99; Twitty v. Camp, Phill. (62 N. C., 1866), Eq. 61, 62.

² Fowlkes v. Wagoner, 46 S. W. R. 586.

³ Roosevelt v. Thurman, 1 Johns. Ch. (N. Y., 1814), 220, 226. Cf. Blackstone Bank v. Davis, 21 Pick. (38 Mass.) 42; Langdon v. Ingram, 28 Ind. (1867), 860, 863; Fisher v. Taylor, 2 Rawle (Pa., 1829), 83. In Stewart v.

Brady, 8 Bush (66 Ky., 1868), 623, 625, the court upheld a restraint upon sale until the devisee attained the age of thirty-five, on the ground that, despite the language of the will, the testator did not intend to devise an unqualified fee. A devisee for life may be validly restrained from selling to any one outside of his family, particularly where he has the power of appointing the fee by will. Fisher v. Wister, 154 Pa. St. 65, 25 Atl. R. 1009.

§ 525. The validity of conditions restraining the alienation of personal property.—The same rules which forbid the imposition of a condition subsequent forbidding the alienation of a fee-simple estate in lands are applicable to a legacy which consists of the absolute and entire interest in personal property. When, therefore, personal property is given in language which conveys the whole interest, with a direction that it shall not be disposed of, or, what amounts to the same thing, that the legatee shall dispose of it to a certain person or class of persons, or that “whatever remains” shall go to certain persons, the condition is void as repugnant to the estate granted to the legatee.¹

§ 526. Conditions involving forfeiture on insolvency—The exemption of property devised from liability for the debts of the devisee, with a devise over.—Testators, prompted by a desire to secure the property given to the beneficiaries for their own use, free from liability for their debts, often insert conditions either that the interest of the legatee in the property shall not be assigned or transferred by him, or that the same shall not be liable in any manner or shape for his debts. Such a condition attached to an estate either for life or in fee, devised absolutely and not in trust, is void, as inconsistent with, and repugnant to, the estate granted.² The theory of the authorities which deny the validity of a restraint upon the alienation of the legal interest is that by so doing parties are by secret arrangement enabled to abrogate and annul settled rules and principles of law. For if a man shall devise a life estate or an estate in fee absolutely, he cannot annex to it conditions against alienation which are absurd and repugnant to reason. A gift of land, whether in fee-simple or for life, to a man until he shall become bankrupt or insolvent, and after his bankruptcy over to other persons, has been pronounced valid from early

¹ In *re Wilcox*, L. R. 1 Ch. D. 229; In *re Valden*, 1 De Gex, Mac. & G. 53; *Bowes v. Goslett*, 27 L. J. Ch. 249; *Bradley v. Peixotto*, 8 Ves. 824; *Rish-ton v. Cobb*, 8 My. & Cr. 153.

² *Brandon v. Robinson*, 18 Ves. 429 (1811), 434; *Rochford v. Hockman*, 9 Hare, 475; *Foley v. Burrell*, 1 Bro. C. C. 274. In the English cases the fact

that the devise is in trust, with a full discretion in the trustee to apply the income for the benefit of the legatee, does not take it out of the operation of the rule, where the beneficiary makes an assignment in insolvency. *Green v. Spicer*, 1 Russ. & My. 395; *Snowden v. Dales*, 6 Sim. 524, 527.

times.¹ Such a gift is clearly to be distinguished from a devise to one for his life, or in fee absolutely, on condition that it shall not be alienated, subject to the debts or liabilities of the devisee, or liable to execution and attachment. In the one case we have an estate upon limitation, which ceases at once on the bankruptcy of the tenant, and the estate over vests and defeats it. In the other we have an interest given in absolute terms, upon which the testator has attempted to engraft incidents which are repugnant to the estate. The testator, while he has a right to impose any legal and valid restrictions upon his bounty which will secure it to the beneficiary, cannot annex conditions which are repugnant to the nature of the estate he gives under existing legal rules. Property given must remain subject to the incidents of property. No man can at the same time be the owner of both the legal and the equitable titles to the property, deal with it at his pleasure, openly enjoy its use, expend its income, and not have it liable for his debts. Property cannot be preserved from the creditors of the owner to whom it has been absolutely given, not in trust, unless by the terms of the will itself his title is to determine, and the property is to go over to some one else, as soon as he becomes bankrupt.²

¹ *Lockyer v. Savage*, 2 Stra. 947; *Lear v. Leggett*, 3 Sim. 479; *Cooper v. Wyatt*, 5 Madd. 482; *Graham v. Lee*, 23 Beav. 391; *Townsend v. Early*, 34 Beav. 28; *Lloyd v. Lloyd*, L. R. 2 Eq. 722.

² See remarks of Lord Chancellor Eldon, in *Brandon v. Robinson*, 18 Ves. (1811), 429, on page 483. All the cases insist upon the necessity for a limitation over, in case of the bankruptcy of the first taker, in order that his estate shall be valid. *Graves v. Dolphin* (1823), 1 Sim. 66, 67; *Green v. Spicer*, 1 Russ. & My. 395; *Rochford v. Hockman*, 9 Hare, 475; *Trappes v. Meredith*, 9 Eq. 229; *Dommett v. Bedford*, 3 Ves. 149, 6 T. R. 684; *Shee v. Hale*, 13 Ves. 404; *Snowden v. Dales*, 6 Sim. 524, 527; *Billson v. Crofts*, L. R. 15 Eq. 314; *Ex parte Eyston*, 37 L. T. 447, 26 W. R. 181; *Ayl-*

win's Trusts, L. R. 16 Eq. 585; *Steib v. Whitehead*, 111 Ill. 251; *McCormick v. Gates*, 75 Iowa, 343, 345, 39 N. W. R. 657; *Broadway N. Bank v. Adams*, 133 Mass. 170; *Foster v. Foster*, 133 Mass. 179; *Blackstone Bank v. Davis*, 21 Pick. 42, 43; *Hallett v. Patterson*, 5 Paige, Ch. (N. Y.) 583; *Bramhall v. Ferris*, 14 N. Y. 41, 44; *Bryan v. Dunn*, 120 N. C. 36, 27 S. E. R. 37; *Chrisman v. Sener*, 162 Pa. St. 577, 579, 29 Atl. R. 719; *Hahn v. Hutchinson*, 159 Pa. St. 133, 138-141, 26 Atl. R. 167; *Van Osdell v. Champion*, 89 Wis. 661, 665, 63 N. W. R. 539, 540; *Nichols v. Eaton* (1 Otto), 91 U. S. 717, 727. A condition that a gift shall go over in case a legatee, when the legacy is payable to him, is "under any legal disability, in consequence whereof he would be hindered in, or prevented from, taking

§ 527. Estates limited until bankruptcy—The validity of conditions exempting income from liability for debt of a legatee—Spendthrift trusts.—The rule of law which has been laid down by the English courts, that a condition attached to a legacy that it shall not be subject to alienation, and in no wise liable for the debts of a legatee, whether given absolutely, or for him in trust, *unless there is a valid limitation over*, is repudiated by a majority of the American courts. The repudiation is by no means universal. Many American decisions can be found which sustain the English rule.¹

Few of the cases, in America at least, have attempted to distinguish between a *forfeiture on bankruptcy* and an estate *upon limitation until bankruptcy*; but have distinguished between cases where the absolute legal title to property is given with a *condition prohibiting alienation*, and cases in which the property is given in trust, with a direction to pay the income only to the legatee upon specified conditions and express restrictions set forth in the will. For the rule that a condition restraining the alienation of the absolute legal title is absurd and repugnant to the estate granted does not apply where the testator creates an estate in trust. In the latter case the legal title to the property devised passes to the trustee with all its legal incidents unimpaired. The trustee has the property with a full power of alienation, though his power to use the income is restricted. The beneficiary has only an equitable interest in the property, and no title to its income except for the express purpose and to the express extent which are pointed out by the instrument creating the trust. As these conditions and restrictions are stated at length in the will which is probated and filed in a court of probate, in order that the legal title may vest in the trustee, and that he may exercise his power to receive the income and to support the beneficiary, all persons dealing with the latter are affected with constructive notice of his financial condition as respects the property in question.

the same for his own personal and exclusive benefit," means some legal disability created by law, as bankruptcy, or that caused by his having become a lunatic, or his having been convicted of felony, or attainted of treason. The lien of a judgment for

a debt owed by him, or any charge created by him by assignment, does not impose a legal disability which will prevent him from receiving his share, or which will permit it to go over. In *re Carew* (1896), 2 Ch. 311.

¹ See note 2, page 691.

Being thus informed of his limited interest in the property, they may deal with him with their eyes open, and cannot subsequently complain they have given him credit because of his apparent ownership of the legal title of the property which they seek to reach through judicial process.¹ A statute pro-

¹*Spear v. Walkley*, 10 Ala. (1846), 328; *Rugely v. Robinson*, 10 Ala. 702; *Hill v. McRae*, 27 Ala. (1855), 175, 178; *Leavitt v. Beirne*, 21 Conn. (1850), 1; *Easterly v. Keney*, 36 Conn. (1869), 18; *Anthony v. Anthony*, 55 Conn. 256, 258, 11 Atl. R. 45; *Steib v. Whitehead*, 111 Ill. 247; *Waldo v. Cummings*, 45 Ill. (1867), 421; *Emerson v. Marks*, 24 Ill. App. 642; *King v. King*, 168 Ill. 273, 274, 48 N. E. R. 582; *Bennett v. Bennett*, 66 Ill. App. 28, 38; *McCormick v. Gates*, 75 Iowa (1876), 343, 345; *Meek v. Briggs*, 87 Iowa (1893), 616, 620; *Thompson v. Murphy*, 11 Ind. App. (1894), 464; *Pope's Ex'rs v. Elliott*, 8 B. Mon. (47 Ky.) 56, 61; *Emerson v. Hewins*, 64 Mo. (1874), 297; *Roberts v. Stevenson*, 24 Atl. R. 873 (1891), 84 Me. 325, 327, 332; *Smith v. Towers*, 69 Md. 77, (1888), 10 Atl. R. 497; *Reid v. Trust Co.*, 86 Md. 464 (1898), 38 Atl. R. 899; *Broadway Bank v. Adams*, 133 Mass. (1892), 170, 172; *Claffin v. Claffin*, 149 Mass. 19, 22; *Billings v. Marsh*, 153 Mass. 311, 313; *Beker v. Brown*, 146 Mass. 369, 371; *Slattery v. Wason*, 151 Mass. 266; *Lane v. Lane*, 8 Allen (Mass.), 350, 353; *Wemyss v. White*, 159 Mass. 484, 485, 84 N. E. R. 718; *State v. Dunbar*, 99 Mich. (1894), 99, 57 N. W. R. 1103; *Lampert v. Haydel*, 96 Mo. 439 (1888), 9 S. W. R. 780; *Partridge v. Cavender*, 96 Mo. 452, 9 S. W. R. 785; *Schoeneich v. Field*, 75 Mo. App. (1898), 452; *Frazier v. Barnum*, 19 N. J. Eq. 316, 318; *Linn v. Davis*, 58 N. J. L. 29, 32 Atl. R. 129; *Bramhall v. Ferris*, 14 N. Y. (1856), 41; *Clute v. Bool*, 8 Paige, Ch. (N. Y., 1840), 83, 87; *Campbell v. Foster*, 35 N. Y. (1866), 361, 367, 373; *Genet v. Beekman*, 45 Barb. 382; *Stewart v. McMartin*, 5 Barb. 538; *Pace v. Pace*, 73 N. C. (1875), 119; *In re Shankland's Appeal*, 47 Pa. St. (1864), 113; *In re Keyser's Appeal*, 57 id. (1868), 236; *Rife v. Geyer*, 59 id. 393; *Holdship v. Patterson*, 7 Watts (Pa.), 547; *Fisher v. Taylor*, 2 Rawle (Pa.), 33; *Vaux v. Parke*, 7 W. & S. (Pa.) 19; *Eyrick v. Hetrick*, 13 Pa. St. 488; *Rees v. Livingston*, 41 Pa. St. 113; *Keyser v. Mitchell*, 67 Pa. St. 473; *Thackara v. Minzer*, 100 Pa. St. 151; *Wanner v. Snyder*, 177 Pa. St. 208, 35 Atl. R. 604; *Beck's Estate*, 133 Pa. St. 51, 19 Atl. R. 302; *Dull's Estate*, 137 Pa. St. 112; *In re Goe*, 23 Atl. R. 363, 146 Pa. St. 431; *In re Barker's Estate*, 23 Atl. R. 365, 159 Pa. St. 518, 525, 526; *Handy's Estate*, 167 Pa. St. 552, 31 Atl. R. 986; *Bremer v. Mohn*, 169 Pa. St. 91, 32 Atl. R. 90; *Tillinghast v. Bradford*, 5 R. I. 205; *In re Seitzinger's Estate*, 170 Pa. St. 500, 514, 37 W. N. C. 211, 39 Atl. R. 1097; *Hendrick's Appeal*, 19 Atl. R. 302; *Jourolman v. Massengill*, 2 Pickle, 81 (86 Tenn., 1887), 5 S. W. R. 719, overruling *Turley v. Massengill*, 7 Lea (75 Tenn.), 359, and *Hooberry v. Harding*, 10 Lea (78 Tenn., 1882), 391; *Patten v. Herring*, 9 Tex. Civ. App. 640, 29 S. W. R. 385; *White's Ex'rs v. White*, 3 Vt. (1831), 338; *Barnes v. Dow*, 59 Vt. (1887), 530, 10 Atl. R. 261; *Garland's Adm'r v. Garland's Adm'r*, 13 S. E. R. 478 (1891), 87 Va. 758, 761, 763; *Markham v. Guerrant*, 4 Leigh (Va.), 279, 286; *Nickell v. Handley*, 10 Gratt. (Va.) 336; *Johnston v. Zane*, 11 id. 570; *Nichols v. Eaton*, 91 U. S. 716, 727. It will be found that in nearly all the American cases which repudiate the validity of conditions against assignment or insolvency,

viding for a bill in equity on the application of a creditor to reach future and contingent interests of a debtor does not vary the rule permitting the creation of such trusts, even though there be no cesser of the estate on insolvency or a limitation over on the happening of such event.¹

both the legal and the equitable titles were vested in the legatee. Even in states which, like Massachusetts and Pennsylvania, permit the creation of spendthrift trusts, absolute gifts of real or personal property, conditioned not to be subject to the debts of the owner of the legal title, are regarded as invalid. *Potter v. Merrill*, 145 Mass. 889, 9 N. E. R. 572. See also § 529. In *Garland's Adm'r v. Garland's Adm'r*, 18 S. E. R. 478, 87 Va. 758, where a sum was set apart in trust, but not to be "bound by the existing debts of the beneficiary, or for future debts or liabilities other than for a decent and comfortable support," it was held that the beneficiary took only a qualified right to the income, subject to liability for no debts except those incurred for supplies, and that the unexpended income should accumulate for the remaindermen. A devise in trust for the life of the beneficiary, with power to use and enjoy the income and profits, the intention of the testator, as stated by him, being "to secure to my children a certain income annually, and to take from them the power of disposing of the same, or creating any liens thereon, or of making the same in any way liable for their debts," was held valid in *Lampert v. Haydel*, 96 Mo. 432, 9 S. W. R. 780. And see also *Partridge v. Cavender*, 9 S. W. R. 785, where under a similar trust the court held that accumulations of income not used for the support of the *cestui que trusts* were not subject to the claims of creditors.

¹ *Wemyss v. White*, 34 N. E. R. (1893), 718, 159 Mass. 484. It was at

first laid down by some of the English cases that the fact that the trustees have a discretion to pay as much as they think proper of the income for the support of the legatee, and that so no creditor can reach it, did not exempt the income from the control of creditors where there was no gift over. *Green v. Spicer*, 1 Russ. & My. 395, 397; *Snowden v. Dales*, 6 Sim. 524, 527; *Percy v. Roberts*, 1 My. & K. (1832), 4, 7; *Lord v. Bunn*, 2 Y. & C. C. C. 98; *In re Bullock*, 60 L. J. Ch. 341, 64 L. T. 736. These so-called "spendthrift trusts" are wholly the creation of courts of equitable jurisdiction. They are analogous in their origin and operation to restraints upon anticipation placed on the separate estates of married women, which were contrived by the English chancellors to protect the property interests of the wife, and which were in direct opposition to all the doctrines of the common law. It is well known that equity, in order to avoid the harsh and unjust operation of the rules of the common law appertaining to the property of married women, created an estate by which a married woman might, by means of the interposition of a trustee, have an estate separate from that of her husband, and not under his control. But as the moral influence of the husband frequently resulted in the alienation of the income of the estate by the wife, to meet the demands of his extravagance or desire for speculation, it was found necessary to go a step further. The step was taken by Lord Thurlow, who caused to be inserted in a marriage settlement a

§ 528. **Effect of annulment of bankruptcy.**—Where the legacy is to be forfeited on bankruptcy, the forfeiture does not take place if the bankruptcy is annulled, either by the consent of creditors or otherwise, before the assignee shall make a demand for, or obtain possession of, the interest of the legatee. In such case the forfeiture is avoided, and the whole legacy should be paid over into the hands of the legatee.¹

§ 529. **Language constituting a valid protection against liability for debts of the legatee.**—The trust provision which is designed to secure the income of a fund against the creditors of the beneficiary, or to prevent him from assigning or pledging it, need not, in this country, be an express direction in terms prohibiting anticipation. The testator is never required to state expressly that income or principal is not to be assignable or transferable, or subject to mortgage or pledge by the legatee; and it would seem from many of the cases

clause restraining the wife from anticipating or alienating either the principal or income of her separate property. *Pybus v. Smith*, 8 Bro. C. C. 340. This provision against alienation was in direct conflict with common-law principles, and was sustainable only in equity as applied to an estate wholly equitable. The separate estate of the *feme covert* and the restraint on anticipation were both creatures of chancery. Both were in violation of common-law rules of property, and, though both have proved of great value, each would be useless without the other. If, then, a court of equity can go thus far in protecting the beneficiaries of one class of trusts against the wiles and blandishments of others by creating an estate never before heard of, in derogation, and indeed in utter disregard, of all existing rules of property, why cannot the court go further to protect another class of trust beneficiaries against the consequences of their own folly and extravagance? Its action will result as formerly in car-

rying out the intention of the donor of a gift, who, it must be admitted, if he bestows a valuable thing out of bounty and with no desire or expectation of pecuniary return, has a right to affix to his gift any conditions calculated to secure its enjoyment by the donee. No rule of policy which forbids a parent to secure a child, as far as money can, from the ills of life and the vicissitudes of fortune, or from his own improvidence and incapacity for self-government, ought to be recognized. *Roberts v. Stevens*, 84 Me. 332, 333.

¹ *White v. Chitty*, L. R. 1 Eq. 372, 375, 14 W. R. 366; *Ancona v. Waddell*, 10 Ch. Div. 157, 162; *In re Parnham's Trusts*, L. R. 13 Eq. 413, 416; *Lloyd v. Lloyd*, L. R. 2 Eq. (1896), 722, 724; *Otway v. Otway*, 2 Ch. 235, 64 L. T. 529, 18 Rep. 536; *Trappes v. Meredith*, L. R. 7 Ch. 248, 41 L. J. Ch. 237; *Samuel v. Samuel*, L. R. 7 Ch. D. 152, 41 L. T. 130, 462, 26 W. R. 750. *Cf. Peate v. Broughton*, 57 L. T. 8; *Metcalfe v. Metcalfe*, 3 Ch. 1, 60 L. J. Ch. 647.

that he is not compelled to state that it shall not be liable for the debts of the beneficiary, or that it shall be free from the interference and control of his creditors, in order to create a valid spendthrift trust. Any expression clearly evincing an intention on the part of the testator to protect the income from waste and dissipation, and to secure its application to the support and maintenance of the beneficiary, is sufficient.¹ Thus, a direction that trustees shall in their discretion apply as much of the income as may be deemed necessary to support the beneficiary is sufficient to protect the income from the claims of his creditors. In such a case the trustees may, by virtue of the direction, apply all the income if they think proper. The beneficiary will then have nothing to assign, nor will his creditors have anything to take under execution.²

§ 530. Trust for the support of a family, how far it may be exempted from the claims of creditors.—A distinction between two classes of cases is to be noted, as regards trusts for the benefit of A. and his family. If the testator intends to provide for the support of a particular person and his wife and children, he may do so in either of two ways. *First*, he may give the legal title of the property directly to A. and his wife and children individually, or as a class, and, in the absence of any express direction indicating how much each is to take, the property will be divided equally among them as tenants in common. Each will take the legal title to his or her share, it will be liable for his or her debts, and no question can arise as to the restraint upon its alienation.³ *Second*, he may devise

¹ *Roberts v. Stevens*, 84 Me. 325, 327, 332, 333, 24 Atl. R. 873; *Baker v. Brown*, 146 Mass. 369, 371; *Slat-terly v. Wason*, 151 Mass. 266, 267; *Maynard v. Cleaves*, 149 Mass. 307, 308; *Smith v. Towers*, 69 Md. 77; *Partridge v. Cavender*, 9 N. W. R. 780; *Clute v. Bool*, 8 Paige, 83, 87; *Grothe's Appeal*, 135 Pa. St. 586, 596; *Beck's Estate*, 133 Pa. St. 51, 19 Atl. Rep. 302; *Barnes v. Dow*, 59 Vt. 530, 543, and cases in note 1, page 693.

² *Wemyss v. White*, 159 Mass. 484, 485, 34 N. E. R. 718; *Garland v. Garland*, 87 Va. 750, 761, 763; *Twopenny v. Peyton*, 10 Sim. 487, 490. A de-

vise in trust for life, with a right in the beneficiary to appoint the fee by will (*Olney v. Balch*, 22 N. E. R. 253, 134 Mass. 318), or a devise in trust to cumulate income during the life of the beneficiary, the same to be equally divided between her children (*Baker v. Keiser*, 75 Md. 332, 23 Atl. R. 735), is subject to the claim of the creditors of the beneficiary. A life estate, though stated to be "for the comfort and support of the widow," if not in trust for her, is subject to her debts. *Maynard v. Cleaves*, 21 N. E. R. 376, 149 Mass. 307.

³ See *post*, § 535 et seq.

the property to A. in trust for the support of his family, or to a third person in trust for the support of A. and his family. If in addition to this he shall provide that the property shall not be liable for the debts of A., and, even where this express provision is not inserted,¹ the question arises whether any portion of the property is liable for A.'s debts, or in case of his insolvency, assignable by him. If a trust is created of which A. is a trustee, the legal title being vested in him *for the benefit of himself and children, and his interest can be separated from that of his wife and children*, it may be assigned and subjected to execution for his debts.²

But if the whole income, or a definite sum, is given in trust to a third person for the support of A. and his family, with a discretion in the trustee to apply the same as he shall think proper, A. can assert his valid right to the whole fund for his support. The expression of the purpose of the trust is not an expression of an intention against alienation, but the only interest which A. or any of his family has in the property in trust, or in its income, is the right to a support. The testator intended to support him, and not another. The condition is presumed that the beneficiary shall not alienate, and it follows logically that the payment of income to his assignee is not such a payment as will support the beneficiary. If the discretion of the trustee is limited to applying income or principal to the support of A., he will exceed his discretion if he applies it to other purposes.³

¹Reed v. Davis, 95 Ga. 202.

²Spear v. Walkley, 10 Ala. (1846), 328, 329; Hill v. McRae, 27 Ala. 175, 183; Dryer v. Crawford, 90 Ala. 181; Page v. Way, 3 Beav. (1840), 20, 21; Perry v. Robertson, 1 My. & K. 4; Lord v. Bunn, 2 Young & C. C. C. 98; Kearsley v. Woodcock, 3 Hare, 185; Rippon v. Norton, 2 Beav. (1839), 63, 66; Wallace v. Anderson, 16 Beav. 533, 536. So in the case of a trust in "A. for the support and maintenance of himself, wife and children during his life, in no way or extent to become liable for his debts, and at his death the property to become equally the property of his children," it was

held that the legal interest of A. should be separated from the interest which he held as trustee for his wife and children, and that the legal interest might be subjected to paying his debts. Rudd v. Van der Hagan, 86 Ky. (1897), 159, 5 S. W. R. 416. Cf. Anthony v. Anthony, 55 Conn. (1876), 256, 258.

³Slattery v. Wason, 151 Mass. (1890), 266, 267, 28 N. E. R. 848; Baker v. Brown, 146 Mass. (1888), 369, 372; Nichols v. Eaton, 91 U. S. (1875), 718, 723; Wanner v. Snyder (Pa., 1897), 35 Atl. R. 604; Lord v. Bunn, 2 Y. & C. C. C. 98. Thus, a devise in trust "*for the support of A. and his family*," the

§ 531. Statutory regulations subjecting income of a trust fund to the claims of creditors.—In some states it is expressly provided by statute that where a trust is created to receive rents and profits, and no valid directions are given for the accumulation of the rents and profits, the surplus of such rents and profits beyond the amount actually necessary for the support and education of the beneficiary shall be liable in equity to the claims of his creditors.¹

The court may, in determining the amount of the income which is necessary for the support of the beneficiary, take into consideration his or her social position and financial standing, his earnings, and whether he has any source of income other than that resulting from the trust. So his accustomed manner of living, and the living expenses of other persons in his walk of life, should be considered.²

trustee, in his uncontrolled discretion, being permitted to pay the income to A. in cash, or to spend it in caring for him and his family, and to educate the children "on a scale comporting with their rank and condition in life," is a gift intended for the support and maintenance of the family collectively, and A. has no interest in the fund which is capable of being separated so as to be subjected to the claims of his individual creditors. *Brooks v. Reynolds*, 8 C. C. A. 370, 59 Fed. R. 923, reversing 55 Fed. R. 783; *Hill v. McRae*, 27 Ala. (1855), 175, 182; *Wilkinson v. Severance*, 45 N. W. R. 724, 80 Iowa, 436.

¹*Spring v. Randall* (Mich.), 64 N. W. R. 1063, construing Ann. Stats., §§ 6614, 5575; *Howard v. Leonard*, 3 App. Div. 277, construing 4 R. S., p. 2438, § 57. A will impliedly directs an accumulation by the trustees of

rents and profits during the infancy of the beneficiary where it gives the entire estate to the trustees, with power to sell or do whatever might, in their judgment, be best for the interests of the estate, and out of the proceeds to pay the infants one-third on their arrival at the age of twenty-one years. *In re Fritt's Estate* (Surr.), 44 N. Y. S. 344. Where a creditor of the beneficiary of a trust for support is permitted by statute to attempt to reach the surplus income, he must establish the fact that a surplus has accumulated before he can maintain his action. *Howard v. Leonard*, 3 App. Div. 277, 38 N. Y. Supp. 363.

²*Howard v. Leonard*, 3 App. Div. 277, 38 N. Y. Supp. 363; *Bunnell v. Gardner*, 4 App. Div. 321, 38 N. Y. Supp. 569; *Schuler v. Post* (1897), 46 N. Y. Supp. 18.

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